

1
2 UNITED STATES DISTRICT COURT
3 FOR THE DISTRICT OF NEW JERSEY

4 CIVIL ACTION NUMBER:
5 STRIKE 3 HOLDINGS, LLC,
6 18-14114

7 Plaintiff,

8 v.
9 MOTIONS

10 JOHN DOE SUBSCRIBER ASSIGNED
11 IP ADDRESS 73.160.162.60,

12 Defendant.

13 Mitchell H. Cohen Building & U.S. Courthouse
14 4th & Cooper Streets
15 Camden, New Jersey 08101
16 Friday, May 31, 2019
17 Commencing at 10:15 a.m.

18 B E F O R E: THE HONORABLE JOEL SCHNEIDER,
19 UNITED STATES MAGISTRATE JUDGE

20 A P P E A R A N C E S:

21 THE ATKIN FIRM, LLC
22 BY: JOHN C. ATKIN, ESQUIRE
23 55 Madison Avenue, Suite 400
24 Morristown, NJ 07960
25 and
26 THE LAW OFFICES OF LINCOLN BANDLOW PC
27 BY: LINCOLN BANDLOW, ESQUIRE
28 1888 Century Park East
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30 For the Plaintiff

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36
37 Proceedings recorded by mechanical stenography;
38 transcript produced by computer-aided transcription.

1 **A P P E A R A N C E S: - CONTINUED.**

2 PAUL H. SCULL, JR., ESQUIRE
3 151 North Broadway
3 Pennsville, NJ 08070
4 For the Defendant

5 ALSO PRESENT:

6 General Counsel for Strike 3 Holdings
7 Emilie Kennedy, Esquire

8 John Pasquale

9 Steven Bunting

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1 THE DEPUTY CLERK: All rise.

2 (OPEN COURT, May 31, 2019, 10:15 a.m.)

3 THE COURT: Good morning, everybody. Please be
4 seated. On the record in Strike 3 Holdings versus John Doe,
5 Docket No. 18-14114. And the other case is listed in the
6 Court's order to show cause.

7 You'll have to excuse me, counsel, I sound worse than
8 I usually do because I'm fighting allergies, and I think I
9 could make it through this hearing, but that's why I sound
10 worse than usual.

11 So let's start by getting the entries of appearance
12 on who's present here. I know there's two general issues
13 we're dealing with; one, the motion to quash, filed in this
14 particular case, and the order to show cause that the Court
15 issued.

16 So let's start with the entries of appearance.

17 MR. BANDLOW: Good morning, Lincoln Bandlow, Law
18 Offices of Lincoln Bandlow on behalf of plaintiff, Strike 3
19 Holdings, LLC.

20 MR. ATKIN: John Atkin of the Atkin Firm on behalf of
21 plaintiff, Strike 3 Holdings, LLC.

22 THE COURT: Do you want to introduce your client?

23 MR. ATKIN: And this is my client, general counsel
24 for Strike 3 Holdings, Emilie Kennedy.

25 MS. KENNEDY: Good morning, Your Honor.

1 THE COURT: Ms. Kennedy, welcome.

2 MR. BANDLOW: Your Honor, with us in the room are
3 also the witnesses John Pasquale and Steven Bunting.

4 THE COURT: Can you just explain their roles, while
5 they're standing? Mr. Bunting and -- what each of them does
6 and their significance.

7 MR. BANDLOW: Mr. Bunting is a forensics expert. He
8 provided a report in this matter. He tested the technology
9 that was used to detect infringers and he'll testify about the
10 accuracy of that technology. He'll also testify about some of
11 the speculations by Judge Lamberth and his opinion as to why
12 this technology might not work, and then Mr. Pasquale double
13 confirmed the PCAPs that captured the specific evidence at
14 issue in the case and he'll testify as to authenticating that
15 evidence.

16 THE COURT: Did Mr. Bunting work on this particular
17 case, Docket No. 18-14114?

18 MR. BANDLOW: He did not work -- he did do not
19 perform the investigation relevant to the particular cases.
20 He tested the investigation methodology and technology to
21 confirm its accuracy and ability to detect infringers.

22 THE COURT: How about Mr. Pasquale, did he work on
23 this particular case?

24 MR. BANDLOW: He did work on these particular cases,
25 yes.

1 THE COURT: Thank you.

2 Counsel.

3 MR. SCULL: Good morning, Your Honor. May it please
4 the Court, Paul Scull on behalf of John Doe Subscriber
5 Assigned IP Address 73.160.60.

6 THE COURT: Thank you, counsel. I have to confess, I
7 was a little perplexed about how we should proceed today,
8 whether to let Strike 3 present its witnesses, cross-examine,
9 ask any questions, or do it some other way. What I would
10 suggest we do is, I have some general questions. If we could
11 just go through those general questions and then we can really
12 bore down on the issues that the Court and defense counsel is
13 most concerned with.

14 Defense counsel, I know you said in your papers
15 you've never had an opportunity to question plaintiff's
16 witnesses. Well, here we are.

17 So, if you'll just again bear with me with these
18 allergies and I just have some general questions. Mr. Atkin,
19 Mr. Bandlow, are you national counsel for Strike 3 Holdings?

20 MR. BANDLOW: For myself, Your Honor, I am -- well, a
21 sort of yes and no. I primarily handle the California and
22 Colorado lawsuits, but I also oversee aspects of all of the
23 national lawsuits. To the extent they get into sort of more
24 granular detail or necessity for hearings such as this nature,
25 I generally tend to be involved in those.

1 MR. ATKIN: Your Honor, I'm local counsel for Strike
2 3 in New Jersey, the Eastern District of Pennsylvania, and
3 part of the Eastern District of New York and I work closely
4 with Mr. Bandlow, so when cases like this come up that require
5 court intervention, we often pro hac in to assist me with
6 them.

7 THE COURT: Does Strike 3 file these cases in all 50
8 states?

9 MR. BANDLOW: No, Your Honor. And that's primarily a
10 function of where we can find counsel for them. But we're
11 generally in a substantial number of them.

12 MR. ATKIN: I'm sorry.

13 THE COURT: Mr. Atkin?

14 MR. ATKIN: We have here with us -- I should have
15 introduced her more. Ms. Emilie Kennedy is here to also
16 testify generally about Strike 3's litigation across the
17 country and she might be able to provide every state that
18 we're in, every district that we do, if you want to know a
19 specific --

20 THE COURT: Okay. Ms. Kennedy, if you think it's
21 appropriate that you answer the questions, it's perfectly fine
22 with the Court.

23 MS. KENNEDY: Sure.

24 THE COURT: I didn't say this, let me say this at the
25 outset of this hearing. The Court is not coming into this

1 hearing with any preconceived notion about what to do. I just
2 would like to get to the bottom of these cases. I will
3 confess that, obviously, the record speaks for itself how many
4 orders this Court has entered granting this ex parte motion
5 for discovery, but it's no secret that there's different
6 courts around the country, especially recently, who have
7 really bored down on this issue and certain issues have come
8 to the top that this Court did not give sufficient
9 consideration to when it issued its orders. I just want to
10 get to the bottom of the facts.

11 So in no way, shape, or form am I coming into this
12 hearing with any preconceived notion about whether we're going
13 to grant a motion, deny a motion, or what to do.

14 Second, and I don't mean to take wind out of your
15 sails, but it's really of no concern to the Court the business
16 that the plaintiff is in. It's a legal business, and there's
17 First Amendment issues and I'm not interested that the owner
18 of the company has this great creative design. I think it's
19 irrelevant to the legal issues that we have to deal with, so
20 I'm not going there, and I can save you time, you don't have
21 to go there.

22 MS. KENNEDY: Okay.

23 THE COURT: I'm interested in the legal issues, and
24 not -- I know some courts have gone off on some prurient
25 interest or -- I'm not going there, okay?

1 MS. KENNEDY: Thank you, Your Honor.

2 THE COURT: So with that clarification, let me see
3 if, in fact, I can just get some background information.

4 MR. ATKIN: Of course, Your Honor.

5 THE COURT: Aside, Strike 3 appealed, I think, Judge
6 Lamberth's opinion.

7 MS. KENNEDY: Yes, Your Honor.

8 THE COURT: That's going to the Court of Appeals in
9 the District of Columbia, I guess?

10 MS. KENNEDY: Yes.

11 MR. BANDLOW: Fully briefed.

12 THE COURT: Is there any other Court of Appeals -- is
13 there any Court of Appeals decision that Strike 3 is involved
14 in?

15 MS. KENNEDY: No, not at the moment.

16 THE COURT: There are some jurisdictions we know,
17 Minnesota, Brooklyn, where some courts have issue opinions
18 denying Strike 3 the relief it requested. Strike 3 has not
19 appealed those decisions, correct?

20 MS. KENNEDY: In the District Court of Minnesota, the
21 opinions that denied us the relief were done by magistrate
22 judges and we did appeal to District Court level.

23 THE COURT: Was it affirmed by the District Court?

24 MS. KENNEDY: In one case it was affirmed and in
25 one case it was reversed. And also, I believe, three, maybe

1 four other magistrate judges in that district went against it,
2 went the other way and granted us leave to subpoena the
3 internet service providers.

4 THE COURT: That was one of my questions. In the
5 jurisdictions where there are decisions that don't grant the
6 relief Strike 3 requests, does Strike 3 continue to file cases
7 in that district?

8 MS. KENNEDY: Most often, yes.

9 THE COURT: Okay. You're familiar with the recent
10 decision by Judge Orenstein in Brooklyn, right?

11 MS. KENNEDY: I am.

12 THE COURT: Does Strike 3 continue to file cases in
13 Brooklyn?

14 MS. KENNEDY: Yes, we just filed about two weeks ago,
15 12 cases in the Eastern District of New York. Six were
16 assigned to the Islip division and six were assigned to the
17 Brooklyn division.

18 THE COURT: So some may or may not go back to Judge
19 Orenstein --

20 MS. KENNEDY: I believe he was assigned two of them.

21 THE COURT: Was his decision appealed?

22 MS. KENNEDY: It was not, Your Honor, and the reason
23 for that was at the time we were transitioning counsel and it
24 just wasn't practical at that point in time for us to appeal
25 that particular decision. In the future, I'm not sure that

1 we'll go the same course. I think --

2 THE COURT: Outside counsel, we're talking about?

3 MS. KENNEDY: Yes.

4 THE COURT: How long have you been general counsel?

5 MS. KENNEDY: I've been general counsel for just over
6 two years.

7 THE COURT: How long -- I'm sorry, where is Strike 3
8 Holdings based?

9 MS. KENNEDY: It's based in Studio City, California.

10 THE COURT: Do you coordinate these cases all over
11 the country?

12 MS. KENNEDY: Yes. So Strike 3's general counsel --
13 I oversee the entire legal department for the company, so it's
14 not just litigation, it's also production agreements,
15 licensing, royalties, clearances, everything. But part of my
16 duties, and I have a staff that assists me, is coordinating
17 the litigation throughout the country and working with outside
18 counsel to make sure that, you know, we're representing the
19 company in the way that, you know, we wish in these cases and
20 to be cautious and careful and protect our copyrights, but
21 also be reasonable.

22 THE COURT: How long has Strike 3 been in existence?

23 MS. KENNEDY: It's been in existence since 2015, but
24 just to qualify that, Strike 3 is our intellectual property
25 holding company. The parent company General Media Systems, I

1 believe, was formed in 2014, when our websites were first
2 launched.

3 THE COURT: I think I saw somewhere -- I could be
4 wrong, I think I saw somewhere that these copyright suits that
5 we're involved in, they started to be filed in or around 2017.

6 MR. BANDLOW: October.

7 THE COURT: Am I right about that?

8 MS. KENNEDY: That's correct, yes.

9 MR. BANDLOW: October of 2017.

10 THE COURT: So I take it, you were -- were you on
11 board at that time as general counsel?

12 MS. KENNEDY: Yes. I started in late May, early June
13 of 2017. So about six months before.

14 THE COURT: So I don't need an exact number, but at
15 the present time, approximately how many cases are pending in
16 the 50 federal courts?

17 MS. KENNEDY: How many have we filed or how many are
18 pending?

19 THE COURT: If you have approximate numbers for both.

20 MS. KENNEDY: I would say pending is probably about
21 200. I believe we've filed, I want to say, approximately
22 3,000.

23 THE COURT: Okay. Do you or does one person approve
24 every single Complaint that's filed?

25 MS. KENNEDY: I have a team that I work with, but

1 yes. We -- and we have a -- somewhat of a complex system in
2 place, but we do go through every Complaint and, you know, in
3 the beginning, all we have is an IP address, so we don't have
4 a lot of information, other than the approximate location of
5 the defendant, how many works they've infringed, how long
6 they've infringed and some other data about the other content
7 that they're also infringing, along with their internet
8 service provider. So we use that information to basically
9 narrow down -- I think approximately every month we have about
10 200 or 3,000 different unique IP addresses that are infringing
11 our content.

12 So we take our data, using different parameters, we
13 narrow it down to basically find the worst 100 to 200
14 infringers in the country.

15 THE COURT: Okay. Is the same form Complaint used
16 throughout the country?

17 MS. KENNEDY: Initially. Again because, you know, we
18 only have a certain set of information, yes, generally, the
19 complaints are relatively uniform.

20 MR. BANDLOW: One thing I'd say, Your Honor, is
21 they're a little more uniform now because prior to the Supreme
22 Court's decision on the registration issue, in some
23 jurisdictions simply having filing an application was
24 sufficient. In other jurisdictions you needed to wait for a
25 registration. So they would vary in that way across the

1 country. It's a little more uniform now.

2 THE COURT: But the substantive allegations, are
3 they --

4 MS. KENNEDY: Yes.

5 THE COURT: -- generally the same? I don't like the
6 term "boiler plate." I'll call it a form Complaint --

7 MS. KENNEDY: Yes.

8 THE COURT: -- around the country.

9 MS. KENNEDY: I will add that in the sort of the
10 second phase of our litigation when we've received the
11 defendant's name and we decide to proceed with the case and
12 serve him with the subpoena, and actually, you know,
13 essentially start the real process of the case, at those times
14 we actually go through and customize every Amended Complaint
15 to fit that case.

16 THE COURT: Are you the -- does the buck stop at your
17 desk that this Complaint is not being filed unless I, Ms.
18 Kennedy, approve it?

19 MS. KENNEDY: Yes.

20 THE COURT: So you approved the particular Complaint
21 in this case.

22 MS. KENNEDY: Yes.

23 THE COURT: That's a lot of work.

24 MS. KENNEDY: I know, I have a -- I will say I have
25 another attorney who also assists me in-house. But especially

1 for every, you know, Amended Complaint when we're actually
2 serving the defendant moving forward, we do review every case
3 and every detail.

4 THE COURT: In case you're wondering why I'm asking
5 these questions, again, this is background, but we'll get into
6 some specific allegations because I do want to explore Rule 11
7 concerns --

8 MS. KENNEDY: Sure.

9 THE COURT: -- and issues of that sort. In the
10 particular Complaint we're talking about, I know Mr. Atkin
11 signed it, we'll find out what role he played in the
12 Complaint, does he verify it, or does he simply sign off as
13 local counsel?

14 MS. KENNEDY: I absolutely work with each one of our
15 attorneys throughout the country. I don't even like using the
16 word "local counsel" because I consider them my counsel. And
17 I'm on the phone with John maybe four or five times a week,
18 probably send, you know, dozen or more e-mails a day. Like,
19 I'm in constant communication with him. Same with Lincoln, of
20 course.

21 THE COURT: Again, with the proviso -- this is not a
22 cross-examination. This is more like --

23 MS. KENNEDY: I know.

24 THE COURT: -- just deposition. I have no
25 preconceived notion about what's going to happen at the end of

1 this.

2 MS. KENNEDY: Sure.

3 THE COURT: So how did defendant counsel's client
4 originally come to Strike 3's attention?

5 MS. KENNEDY: It first came to our attention -- we
6 have an investigator named IPP and their job is to --

7 THE COURT: Where are they located?

8 MS. KENNEDY: They're located in Germany.

9 Their job is to track the infringement and they
10 have like a certain software and system in place that monitors
11 the infringement across the BitTorrent network, tracks it and
12 records the IP addresses. Then they give the data to us, and
13 once we receive the data from them, again, using specific
14 parameters I've given to my team, we sort through the data and
15 find the worst of the worst the infringers who are doing it
16 over a long period of time in jurisdictions where we have
17 counsel, and who we also have a lot of other evidence of the
18 infringement that's going on, that we can use to build our
19 case.

20 THE COURT: So IPP sends you reports of alleged
21 infringers?

22 MS. KENNEDY: Yes.

23 THE COURT: Daily, weekly, monthly?

24 MS. KENNEDY: And just to take a step back, when I
25 say "reports," it's mostly data. So the data that they can

1 record based on capturing the IP addresses on the internet,
2 and they send it, I'd say, approximately once a month. Also
3 just to add -- sorry, and stop me --

4 THE COURT: No, go ahead, go ahead.

5 MS. KENNEDY: In terms of IPP
6 being located in Germany, you know, when we first sat down at
7 the company and started considering whether we wanted to go
8 this route, we wanted to find a forensic company that was
9 located in the U.S. that could do this, you know, do this
10 investigation for us, and we even, you know, we spoke with a
11 number of different firms that we thought could do it and no
12 one could do it as well as IPP could. At the end of the day,
13 I felt that their technology and their data was the best, so
14 that's why we went with them, but it is somewhat of an
15 inconvenience for us to have them in Germany, which is why we
16 brought in 7 Rivers and John Pasquale here to double verify
17 the PCAPs before we file a Complaint.

18 THE COURT: What does IPP actually do?

19 MS. KENNEDY: So IPP has the software and system in
20 place that crawls the BitTorrent network and it basically
21 receives part of our infringing file from the various
22 defendants, or various infringers that are out there
23 distributing our content, and it records their IP addresses
24 and it records the BitTorrent software that they're using, and
25 the date and time and some other data and sends it to us.

1 THE COURT: Are there written instructions that IPP
2 follows, or protocol that IPP follows?

3 MS. KENNEDY: Yes. I don't know if there's any sort
4 of, you know -- you know, I didn't necessarily write a memo
5 for them, but I'm in constant communication with them and, you
6 know, we certainly have -- and we have a contract as well.
7 But there's certain things like, you know, they're never
8 allowed to distribute our content. That's, you know, not
9 okay. They can't in any way, shape, or form contribute to the
10 infringement that's going on out there.

11 They have to record everything in a PCAP, which is
12 like our forensically sound wave capturing the evidence. They
13 have to be available to testify during depositions or attend
14 hearings. What else.

15 You know, we put on them a lot of pressure to
16 constantly update their system and develop new technologies as
17 they come out so that we're getting the best state-of-the-art
18 technology. I'd say off the top of my head, that's the
19 general rules with them. But again, you know, I speak to them
20 quite often, so -- they certainly know that we want to do this
21 the right way, we want to do this ethically and we expect the
22 best out of them.

23 THE COURT: Presumably -- let me just say the
24 Complaint in this case was filed on September 20, 2018.

25 MS. KENNEDY: Okay.

1 THE COURT: Presumably, sometime before that, you got
2 -- or Strike 3 got a report from IPP with information
3 regarding the defendant's ISP address, right?

4 MS. KENNEDY: The IP address, yes. So what we
5 received was ongoing data. So when we file these cases,
6 again, it's not just one movie or two movies and it's not just
7 like a snapshot or once. You know, we're really trying to
8 stop the worst infringers. And I say that because when you
9 sue them, they stop infringing and you take them off of
10 BitTorrent, so they stop distributing the most amount of our
11 movies.

12 So oftentimes, you know, we will receive data from
13 IPP over the course of six months containing the IP address's
14 information, you know, and the hit dates and the infringement
15 that's taking place. But eventually, it gets to a point where
16 it's like, okay, we've seen this IP address going for a long
17 time now, it's not going to stop, you know, I don't know what
18 else to do except file a lawsuit, and 99.9 percent of the
19 time, when you file a lawsuit, the infringement does stop.

20 THE COURT: The dates of the alleged infringement in
21 this case extends over a year or so, so does that mean that
22 there were different monthly reports where this particular ISP
23 address was on it?

24 MS. KENNEDY: Yes, that's correct.

25 THE COURT: And is there some sort of computer

1 program you use to search for ISP addresses who frequently
2 appear?

3 MS. KENNEDY: Yes. It's not necessarily a computer
4 program. We work with a very sophisticated data analytics and
5 management team that stores this data and is able to monitor
6 and sort it.

7 THE COURT: In-house?

8 MS. KENNEDY: Yes. They're independent contractors,
9 but we work with them in-house.

10 THE COURT: Okay. So are they given instructions
11 about how often they have to find hits or how often someone
12 has to download something to bring it to your attention?

13 MS. KENNEDY: Yes. Generally, it's a minimum usually
14 of about 25 works, and it's over at least a couple of months.

15 THE COURT: Okay.

16 MS. KENNEDY: Because again, if someone is just
17 infringing our movies once or twice or even three or four
18 times, we are not going to go to the effort to file a court
19 case over that, because that's just -- there's just so much of
20 it out there and there's just, you know, it's not worth our
21 time, their time. But when we see someone who is constantly
22 doing it and they're continuing to do it, then it is actually
23 is going to affect our revenue and, you know, we've got a lot
24 of subscribers. We've got almost a hundred thousand
25 subscribers and we want to encourage them to continue

1 subscribing to our content. And if they can just get the
2 entire library on the internet, it's, you know, it's going to
3 hurt our company.

4 MR. BANDLOW: The other thing, Your Honor, I would
5 just add, is that by looking at a lot of works being infringed
6 over a period of time, you also have a better sense that it is
7 probably, in fact, the subscriber. If you just sued somebody
8 off a one-time hit, maybe it's a visitor to the house that
9 day. But the long period of time and lots of works, gives you
10 a better idea that it's much more likely it is the subscriber.

11 THE COURT: Let's explore that a little bit. Why do
12 you conclude that if there's a lot of downloads, it's the
13 subscriber? That's an assumption you make, right?

14 MR. BANDLOW: It's an inference that you can make
15 from the evidence because if, you know, you have guests come
16 to your house and they say, oh, I want to use the Wi-Fi and
17 they use the code and they can tap in and, sure, they might do
18 some downloading. But if you have it over a long period of
19 time and lots of works, it's very unlikely that it's a casual
20 guest. It's very unlikely it's a Wi-Fi freeloader, as has
21 been alleged. It's much more likely that it's either the
22 subscriber or someone in the house.

23 Clearly, we understand that there are often going to
24 be circumstances in which, you know, mom is the subscriber on
25 it, but it's dad, or adult son or something of that nature

1 that's actually doing the infringing, that is correct.

2 THE COURT: Suppose I subscribe in this area,
3 Comcast. So they have my name on file and I have -- my kids
4 are grown, they're not in the house, but suppose I had three
5 children and a wife. Why is it more likely if there's 31
6 downloads that it's the subscriber who's downloading it rather
7 than one of the kids?

8 MR. BANDLOW: As I said, it's more likely that it's
9 the subscriber or somebody in the house, and that's -- that's
10 the point, is we start a lawsuit with a fairly good reason to
11 believe that it is the subscriber or someone in the house,
12 that's why getting that early subpoena, that will give us the
13 name and address, we can take that additional information, do
14 our separate investigation looking at social media and things
15 of that nature and we oftentimes will say, oh, this looks like
16 a 25-year-old in the house, this looks different.

17 THE COURT: I know, but that's not what you said.
18 Hold on. You said that if there's a lot of downloads, the
19 reasonable inference is it's the subscriber that's downloading
20 it, and I question that.

21 MR. BANDLOW: Yeah, I meant to say the subscriber or
22 someone in the household. I apologize, Your Honor.

23 THE COURT: Okay. You clarified your answer.

24 MR. BANDLOW: Yes.

25 THE COURT: Is it equally as -- like 31 downloads, is

1 it equally as likely that the subscriber downloaded than
2 someone who resides in that house downloaded it?

3 MR. BANDLOW: I'm not sure there's much difference
4 between the likelihoods of that. I don't know what the
5 empirical -- maybe Emilie knows a little bit further. I think
6 it's certainly more directly tied to somebody in the house.

7 THE COURT: Okay. Why, then -- okay. Let me ask
8 this question. When Strike 3 files a Complaint against the
9 John Doe, does it know who lives in the house?

10 MR. BANDLOW: No, not at all. We only know an IP
11 address.

12 MR. ATKIN: Sorry, Your Honor, I want to interject.
13 One problem with the hypothetical with the wife and three
14 children is Strike 3 doesn't know who the subscriber is, what
15 their exact address is. They also don't know that there's a
16 wife and three children. So it's entirely possible that a
17 single person is alone in the house. The only piece of
18 information we have is we know there's "a" subscriber.

19 THE COURT: It's equally as likely that it's
20 one person, or three people, or five people. Counsel just
21 said Strike 3 doesn't know who lives in the house, right?

22 MR. ATKIN: Correct.

23 THE COURT: But when you file your Complaint, what do
24 you allege in your complaint?

25 MR. BANDLOW: We're alleging that an IP address has

1 been associated with fairly rampant copyright infringement.

2 THE COURT: Who is the named defendant?

3 MR. BANDLOW: It's IP address with whatever the
4 numbers are.

5 THE COURT: No?

6 MR. BANDLOW: Subscriber that has --

7 THE COURT: It's the subscriber to that IP address,
8 right?

9 MR. BANDLOW: Yes.

10 THE COURT: That's the defendant. The subscriber is
11 the defendant, right?

12 MR. BANDLOW: For the purposes of at the very
13 beginning until we can get the information to see who we may
14 want to amend and actually name, yes.

15 THE COURT: So here's my question. We're going to go
16 through this. Look at the Complaint in this case. It says:
17 The defendant downloaded. The defendant is the owner of the
18 IP address. What basis do you have to -- not you. What basis
19 does Strike 3 have to say that? What basis does it have to
20 say that the owner of the IP address downloaded as opposed
21 to -- let's forget the visitor to the house, okay -- the kid
22 who lives there, or, you know, the roommate, you know.

23 I don't know if you have children, but my kids have
24 roommates in certain houses that they live, three or four guys
25 or girls live together. You don't know who it is, right?

1 MR. BANDLOW: My children are constantly on the
2 internet, Your Honor, yes.

3 THE COURT: But I guess -- we will get to --

4 MR. BANDLOW: I'm fairly certain they're just playing
5 Fornite, but who knows.

6 THE COURT: We'll get to this. We'll get to this in
7 more detail. We're going to bear down on this but --

8 MR. BANDLOW: I understand what Your Honor is saying.
9 I think we're saying in our initial Complaint that the
10 subscriber is going to get us to that infringer.

11 THE COURT: No, that's not what you say, counsel.
12 That's not what you say.

13 MR. BANDLOW: And if -- we may need to look at our
14 Complaint and perhaps tweak what we're saying. I do
15 understand your point.

16 THE COURT: Do you have the Complaint?

17 MR. BANDLOW: I don't have that one in front of me
18 right now, Your Honor, but I do agree with you. We do say
19 it's the subscriber because that's what we're going to need
20 the subpoena to help us get the further investigation.

21 THE COURT: So what's the basis for saying it? What
22 is the Rule 11 basis for saying in your Complaint, in black
23 and white, the defendant, owner of the IP address, or the
24 registered owner, downloaded. That's what it says.

25 MR. BANDLOW: Well, there's two things and then I'll

1 let Ms. Kennedy elaborate. But two things I'd say, Your
2 Honor. A, the length of time and the amount of infringements
3 gives us a reasonable inference that it could be the actual
4 subscriber who's controlling --

5 THE COURT: Could be.

6 MR. BANDLOW: Yes. And B, even the subscriber, if
7 they are not the actual infringer, may have the ability to
8 stop the infringement, there maybe contributory or vicarious
9 theories that you could rely on, but you at least have a good
10 faith basis that they're under some level of control of the
11 acts of infringement. But -- and I know Ms. Kennedy wants to
12 add to that.

13 THE COURT: Look at the Complaint in this case.

14 MR. BANDLOW: I do understand that, Your Honor.

15 THE COURT: Mr. Atkin, could you pull up the
16 Complaint on your computer?

17 MR. ATKIN: I'm trying to, Your Honor. I don't know
18 the Wi-Fi code for the court. I printed out everything but
19 the Complaint.

20 THE COURT: Give that to Mr. Atkin.

21 MR. ATKIN: May I approach, Your Honor?

22 THE COURT: I want to pull up the Complaint.

23 And I'm not -- I just don't want you to think I'm
24 surfing the internet on Facebook. I have the documents on my
25 iPad, so that's what I'm pulling up.

1 MR. SCULL: Your Honor, I'm going to let the record
2 reflect I'm handing them a copy of my Compliant.

3 THE COURT: Fantastic, counsel. So you have the
4 Complaint.

5 MR. BANDLOW: I do, Your Honor.

6 THE COURT: There's one count in that Complaint,
7 right?

8 MR. BANDLOW: Yes.

9 THE COURT: It's direct infringement, right?

10 MR. BANDLOW: Yes.

11 THE COURT: There's no allegation about vicarious
12 liability, right?

13 MR. BANDLOW: There's no contributory or vicarious
14 claim in the complaint, Your Honor.

15 THE COURT: Who's the named defendant in this case?

16 MR. BANDLOW: The named defendant is John Doe,
17 Subscriber Assigned IP Address 73.160.162.60.

18 THE COURT: That's whoever the registered owner of
19 that IP address, right?

20 MR. BANDLOW: The subscriber of that address, yes.

21 THE COURT: So if I am a Comcast customer, when I
22 move to the house, I signed up with Comcast, I'm the
23 subscriber, right?

24 MR. BANDLOW: Yes.

25 THE COURT: Okay. So go to Paragraph 27.

1 MR. BANDLOW: I have it, Your Honor.

2 THE COURT: Let me read it into the record, quote --

3 MR. BANDLOW: "Defendant downloaded, copied, and
4 distributed a complete copy of each of plaintiff's works
5 without authorization."

6 THE COURT: The defendant is the IP owner, right?

7 MR. BANDLOW: The subscriber, yes.

8 THE COURT: What basis does Strike 3 have to make
9 that allegation?

10 MR. BANDLOW: Again, the length of time and amount of
11 infringement, reasonable inferences that come from such a
12 downloading, and if you want to add, I mean, I think that
13 that's the basis for us to at least have the ability to think
14 it's plausible that it was a subscriber and obtain further
15 information to confirm that suspicion.

16 THE COURT: I'm giving you the hypothetical
17 situation; married couple, three kids in the house. Is it
18 just as plausible that the wife or one of the three children
19 download -- they all live in a house. Is it just as plausible
20 that the wife or three children downloaded the material as it
21 is the owner of the IP address?

22 MR. BANDLOW: It may be less plausible that it's the
23 children because our research will show us the times when
24 things are being downloaded. So you can make some inferences
25 based on children are probably not downloading at 3:00 a.m.,

1 perhaps.

2 THE COURT: What?

3 (Laughter.)

4 MR. BANDLOW: So there's other information. I hope
5 your children are asleep at 3:00 a.m. Mine, typically, are
6 barely hitting the hay.

7 THE COURT: But what if they're 20 years old?

8 MR. BANDLOW: Then maybe there's some inferences it
9 might be them or might not be. But we start with just a
10 number and we need some further information, there's no
11 question.

12 THE COURT: So I'm just trying to get this straight
13 in my own head. Strike 3 knows that 31 works were downloaded
14 at this IP address.

15 MR. BANDLOW: And the times and dates they were.

16 THE COURT: Times and dates. They have no idea who
17 lives there, right?

18 MR. BANDLOW: We have no idea what the address is.

19 THE COURT: You have no idea.

20 MR. BANDLOW: None.

21 THE COURT: They have no idea if the owner of the IP
22 address lives there.

23 MR. BANDLOW: No. I mean, we assume the subscriber
24 lives at the address where the infringement will track to,
25 yes.

1 THE COURT: That's an assumption you make, but you
2 don't know that, do you?

3 MR. BANDLOW: No. We don't know our defendant --
4 much about our defendant.

5 THE COURT: If my kid has no credit history and moves
6 to an apartment and I want to pay for his or her Comcast, I
7 register it to my name. I'm not living there, right? That's
8 a plausible scenario, right?

9 MR. BANDLOW: Plausible, plausible. I think
10 unlikely. I think the typical scenario is the subscriber in a
11 home that pays for their cable.

12 THE COURT: If Strike 3 doesn't know who lives in the
13 residence where this IP address is, how can it allege in
14 Paragraph 27 that the owner or registered owner of that IP
15 address was the person who downloads that copyrighted work?
16 I'm trying to figure out what the basis of the allegation is.

17 MR. BANDLOW: We think that that's the most
18 reasonable inference at least at that early point, that it's
19 the person in charge of the account, because typically people
20 in charge of accounts monitor activity that's going on on a
21 bill that they're paying for.

22 So we make some reasonable inferences that this
23 substantial amount of infringing activity -- and again, bear
24 in mind, you say 31 infringements or what have you, but
25 they've infringed a lot of other stuff, because we have their

1 whole history of every mainstream movie, every song, every
2 book, every video game. We have a massive amount of
3 information of the substantial amounts of infringement they're
4 doing, so it's beyond just our works. So it seems plausible
5 that this massive amount of infringement is being done by
6 somebody that's, you know, where the buck stops, and that's
7 usually the subscriber.

8 THE COURT: Hypothetically, suppose defendant enters
9 their appearance in the case and files a Rule 12 motion.
10 Plaintiff's Complaint does not state a cause of action against
11 me because all the Complaint says is I own the IP address.

12 Is that sufficient under Rule 12 to make out a cause
13 of action against the defendant?

14 MR. BANDLOW: Yes, I believe so, and numerous courts
15 have held that it is because we're at -- at Rule 12, we're at
16 the plausibility standard. If the defendant comes in and
17 says, you know, I'm filing a motion because it was my son,
18 you're talking about a summary judgement type thing where
19 you're introducing outside facts and that might change the
20 equation. But in a Rule 12 stage, we have enough information
21 for it to be plausible for at least -- allow us to go forward
22 and get some more information.

23 Now, certainly if -- in the real world scenario, when
24 the Doe gets the notice from the -- from their cable company
25 and it's not them, or it's the son, we're immediately going to

1 hear from them or their attorney is going to say, here's the
2 evidence that it was not me, it was my son, or it something
3 else, and we're going to go a different route --

4 THE COURT: We're going off on a tangent, we're going
5 off on a tangent.

6 MR. BANDLOW: But we have plausibility enough under
7 the standard, under Iqbal Twombly, for us to survive --

8 THE COURT: Would you agree with me that there's case
9 law that sets a contrary position that merely owning an IP
10 address in and of itself is not enough to make out a cause of
11 action against alleged infringer?

12 MR. BANDLOW: If that's all you have and have no
13 other evidence, that *Cobbler* does seem to say -- but keeping
14 in mind the procedural posture of *Cobbler*. *Cobbler* was after
15 the subscriber was identified, name and address. The
16 subscriber who was the head of an adult care facility was
17 deposed, documents were produced, and then the plaintiff still
18 decided to say, well, all we really know is there was
19 infringement and this guy's name is on the account. We're
20 going to amend our Complaint and say we still get to go
21 forward, and the Ninth Circuit said, no, that's not enough.
22 That's all you have is infringement and the name, that's not
23 enough. We'll never be in that circumstance.

24 THE COURT: Was *Cobbler* a Rule 12 context or summary
25 judgement context?

1 MR. BANDLOW: It was a Rule 12, but in that strange
2 position of a lot of information being known.

3 THE COURT: Rule 12, doesn't the Court just look at
4 the four corners of the Complaint?

5 MR. BANDLOW: It did but it also did look at that
6 procedural history of, you knew very well that all you knew
7 was the name and address.

8 And so I agree with you that we're at the stage in
9 this case, we're in the stage of, can we get the name and
10 address. Once we get the name and address, there's no
11 question, Your Honor, we have an obligation before we file our
12 Amended Complaint under Rule 11 to make sure that we have
13 more.

14 THE COURT: You skipped a step. We didn't get to the
15 amendment yet. I'm going back to the original Complaint.
16 What's the basis --

17 MR. BANDLOW: *Cobbler* says you have enough.

18 THE COURT: I'm sorry?

19 MR. BANDLOW: *Cobbler* says you have enough at the
20 original Complaint. *Cobbler* -- if you read *Cobbler*'s
21 decision, *Cobbler* agrees that it was enough for you to get the
22 name and address of the subscriber. That *Cobbler* says very
23 specifically that that's a piece of the puzzle, that's the
24 words they used, that you're allowed to get.

25 So *Cobbler* -- we hear *Cobbler* mentioned to us in

1 these early stages of the case is a lot, and I love it when
2 it's mentioned, because it's a great case for us at this
3 stage, because *Cobbler* said, you get that information. You
4 have a Complaint that says, I don't know who this person is,
5 but I know it's a subscriber and I want to know who their name
6 and address is. *Cobbler* says, okay, you get the name and
7 address.

8 Once you've got that, if you amend and all you've got
9 is, I've got a name and I think infringement is happening, you
10 don't have enough. We haven't gotten there yet. We haven't
11 gotten the name and address.

12 THE COURT: Are there not cases around the country as
13 long as my arm that say merely being a subscriber to an IP
14 address is not enough to make a cause of action for
15 infringement?

16 MR. BANDLOW: I'm not aware of the length-of-your-arm
17 cases that say that. I know *Cobbler* addresses facts that
18 relate to that issue, but I don't -- I don't think there are
19 cases that say, at least having reason to believe that
20 infringement may be happening at an IP address that is
21 controlled by a subscriber, that that's not enough to get you
22 past the initial stage to get some minimal level of
23 information.

24 THE COURT: Would you agree with that, counsel?

25 MR. SCULL: I wouldn't, Your Honor.

1 THE COURT: Have you cited those cases in your
2 papers?

3 MR. SCULL: I haven't cited *Cobbler*.

4 THE COURT: No, not *Cobbler*, but other cases.

5 MR. SCULL: I have, Judge, I have, and clearly the
6 trend in these cases, even the case that was recently decided
7 in Northern California is to stop it right at the Complaint
8 stage, because there isn't enough.

9 Your Honor hit the nail on the head. Looking at the
10 four corners of the Complaint is simply not enough.

11 MR. BANDLOW: I'm not aware of any such case.

12 THE COURT: Okay.

13 MR. BANDLOW: In this context, in the illegal
14 downloading case, the MPAA the RIAA, we're doing these
15 lawsuits for dozens of years. These are not new lawsuits.
16 These have been done by Microsoft, they've been done by
17 various other record companies, et cetera. I'm not aware of a
18 ruling that says you basically can't file these lawsuits.

19 You have to understand, there's no way we know
20 anything more than an IP address, because that's the nature of
21 how BitTorrent works. We know there's a person out there
22 hiding, masking themselves under their internet address to
23 steal our works. We need to find out who they are. We have a
24 reasonable basis to believe that it is the subscriber that's
25 doing it. It's enough to get us in the courtroom door, and

1 under Cobbler, it's enough to get us the name and address to
2 proceed further. No question, we have an obligation once we
3 have that additional information to think carefully about
4 amending the Complaint if we have enough to proceed.

5 There is the *Glacier* case, by the way, out of the
6 Ninth Circuit. *Glacier* case -- the *Glacier* case, which was in
7 a mainstream movie context, flat out says, this kind of
8 litigation with this basic allegation is entirely appropriate
9 under Rule 12.

10 THE COURT: While we're on the Complaint, I have a
11 couple of questions --

12 MR. BANDLOW: Sure.

13 THE COURT: -- about the allegations in the
14 Complaint. This is the form complaint that Strike 3 uses in
15 of all of its cases, right?

16 MR. BANDLOW: Its form, with the exception of,
17 obviously, we change the IP address, the number of works, the
18 period of time, but yes.

19 And by the way, I look at these monthly and we make
20 little tweaks all the time to make sure that we're comfortable
21 with it.

22 THE COURT: Paragraph 8. Second sentence, small i.
23 "Defendant committed the tortious conduct alleged in this
24 Complaint in this state."

25 What is the basis for saying the owner of the IP

1 address did the downloading?

2 MR. BANDLOW: That is through our investigation using
3 Maxmind. So when you have an IP address -- and I'm going to
4 let Ms. Kennedy testify about this, because she really does
5 this. She's the one that actually does this or interacts with
6 people who do this. Maxmind is a software that once you have
7 an IP address, you can plug it in and it will identify a
8 location within a --

9 THE COURT: I don't mean to interrupt you, counsel,
10 but I think you're going off on a tangent, because I'm not
11 worried about the venue issue right now.

12 MR. BANDLOW: Okay.

13 THE COURT: Okay? Because I know that's where you're
14 going.

15 It says, "Defendant committed the tortious conduct."
16 That's what I'm focusing on.

17 MR. BANDLOW: Um-hum.

18 THE COURT: What is the basis for saying the owner of
19 the IP address did the downloading?

20 MR. BANDLOW: I think it's the same answer I've given
21 before, which is the length of infringement -- the length of
22 time of infringement, the amount of infringement of not only
23 our works, but substantially everybody else's works. It gives
24 us reason to believe it's plausible that it is the subscriber
25 who resides at the household that's doing it.

1 THE COURT: Is it just as plausible that someone who
2 resides in the house did the downloading?

3 MR. BANDLOW: It maybe is plausible, but I think it's
4 more plausible that it is the subscriber. I do think it is
5 with this significant amount of infringement.

6 As I said, it's -- you know, I would think the person
7 that's not on the account knows someone's may be watching the
8 account, and if they're going to engage in that much
9 infringement, they'd be aware that someone's going to come to
10 them and say, why am I out of data in three days, et cetera.

11 So it's more likely this massive amount of
12 infringement is the subscriber that's in control of the
13 account. It doesn't mean it always is and we need more
14 information to confirm, there's no question about that. I
15 don't want the Court to believe that we're saying, we know
16 slam dunk, hundred percent it's the actual subscriber. We
17 don't. We know that it's much more likely that it is, but we
18 need some further information to confirm that.

19 THE COURT: But that -- but I keep on getting back to
20 Paragraph 27. But in Paragraph 27 Strike 3 says in black and
21 white, defendant, the owner of the IP address, did the
22 downloading.

23 MR. BANDLOW: Because we believe that it is likely
24 the subscriber.

25 If you find information that disabuses us of that

1 belief, we will go a different direction.

2 THE COURT: Same paragraph, Paragraph 8: Defendant
3 resides in the state. You're assuming -- not "you're" --
4 Strike 3 assumes that because they registered with, say,
5 Comcast?

6 MR. BANDLOW: Well, yes, because the IP address
7 tracks to the state, yes, and that they've registered with a
8 provider in that state.

9 THE COURT: Defendant has engaged in business
10 activity in the state. What's the basis of that, "business
11 activity"?

12 MR. BANDLOW: That they have a relationship with
13 local carriers, et cetera, of that nature, yes, and that
14 they're, you know, engaging in conduct over the internet
15 within the state.

16 THE COURT: That's the business you're talking about?

17 MR. BANDLOW: Yes.

18 THE COURT: In Paragraph 10, at the end, it refers to
19 defendant or defendant's agent. This is the first time that
20 the phrase "defendant's agent," is used. What does that refer
21 to?

22 MR. BANDLOW: I mean, I believe it refers to the fact
23 that it may be somebody acting on defendant's behalf that's
24 doing the infringement.

25 THE COURT: That's not what you say in Paragraph 27.

1 MR. BANDLOW: I agree, Your Honor, and I might be
2 looking at this one a little closer next week. I agree that
3 maybe we should expand to say defendant or someone under
4 defendant's control or within defendant's household. That may
5 be something we would be willing to consider.

6 Again, we have a reasonable belief that it is
7 probably the subscriber, but we also know there's a
8 possibility it could be someone in the household.

9 THE COURT: I mean, if you take, you know, say, a
10 typical suburb where -- you know, I don't know what the
11 statistics show, but a family with a wife and a husband, two
12 or three children. I guess I'm trying to understand the basis
13 for making the reasonable inference that it's the subscriber
14 that is doing the downloading rather than someone else in the
15 house, if you don't know who else lives in the house.

16 MR. BANDLOW: See, so again, if you -- if you're
17 doing this amount of infringements, this conduct, this
18 information is uniquely in the control of the defendant. They
19 know this information about who's doing it. But in
20 particular, you know, if -- again, it's massive amounts of
21 infringement.

22 I've got eight- and ten-year-olds in the house, so I
23 doubt they'd be doing this, but I also have -- there are other
24 kids that are older. If it's this massive amount of
25 infringement, it's hard to imagine that the subscriber is not

1 getting informed about that by their cable company, the
2 massive use of data, you're out of data, et cetera. It's just
3 hard to believe that this massive amount of infringement would
4 not have somehow come to the attention of the subscriber
5 and/or be the subscriber that's doing it.

6 THE COURT: Might the exact opposite be true, because
7 if someone is on BitTorrent downloading, I think it's a
8 reasonable inference that they are pretty sophisticated on the
9 computer, they may know that they could be traced, so they're
10 going to make sure that they use an ISP address that can't be
11 traced to them?

12 MR. BANDLOW: Well, no, they're using their IP
13 address at home.

14 THE COURT: Yes, but they're not the subscriber.

15 MR. BANDLOW: Yes. But that amount of activity will
16 be brought to the attention of the subscriber is what I'm
17 saying.

18 THE COURT: Question for you: Is there one ISP
19 address per, say, residence?

20 MR. BANDLOW: There's one IP address per account, I
21 believe, yes. Per account, yes.

22 THE COURT: Okay. So --

23 MR. BANDLOW: There could be multiple within a
24 residence --

25 THE COURT: So if I have a laptop, a desktop, an

1 iPad, an iPhone in my house, do they all have the same
2 address?

3 MR. BANDLOW: If they're all connected to that same
4 provider, yes, they would all have that same IP address, yes.
5 They might have different port numbers might come up. There
6 may be a way to distinguish which computer in the house was
7 being used to do the infringement, because that will have a
8 different port number in the hash numbers that we get in our
9 investigation. So there is maybe a way to determine which
10 computer in the house it's coming from.

11 THE COURT: Okay. I'm not sure you're the right
12 person to answer this.

13 MR. BANDLOW: He's sitting behind me.

14 THE COURT: I want to get this right, because I think
15 it is an important point.

16 We're still at the early stage. IPP
17 sends its information to Strike 3 and some report comes to Ms.
18 Kennedy about, this is a frequent flyer, someone who downloads
19 a lot. Does Strike 3 know if the downloading was done on one
20 device, two device, three device, et cetera?

21 MR. BANDLOW: Yeah, I think we can look at that data
22 and see some information that will talk about different port
23 numbers that might give us some information about multiple
24 devices.

25 THE COURT: Ms. Kennedy, I want to get this right.

1 Do you know the answer to this question?

2 MS. KENNEDY: Can we see the number of devices? Not
3 necessarily. The information that we do get is the BitTorrent
4 program that is being used to commit the infringement. So we
5 can see, you know, over the course of the infringement that
6 it's the same BitTorrent program. Sometimes they'll update
7 it.

8 So again, based on all of the information before us,
9 we have a good faith belief that it is coming from one
10 computer, because the BitTorrent program stays the same,
11 unless they, you know, go through an automatic update or
12 something, over, you know, eight, nine months.

13 THE COURT: Is that something that Strike 3 looks at
14 before it decides to file a Complaint, how many devices
15 downloaded a copyrighted works?

16 MS. KENNEDY: We don't see how many devices but we do
17 see and look for a consistent BitTorrent program over time.

18 MR. BANDLOW: You have to download a torrent program
19 onto a computer to use BitTorrent. So it will have its unique
20 identifying information.

21 THE COURT: So, again, hypothetically, there's a
22 desktop in a house, there's a laptop in a house, and there's
23 an iPad in the house. Whoever is downloading the copyrighted
24 works would download the BitTorrent program on to the three
25 devices, correct?

1 MS. KENNEDY: Generally, no, it's not likely that
2 someone would download it on an iPad. It might be possible,
3 but given the size of our movies because they are filmed in 4K
4 HD and several -- you know, they are large, large files and
5 when you're talking dozens of files, it's a huge amount of
6 data. So it's not going to be on, like, an iPad or an iPhone.
7 Desktop is -- you know, if they have a desktop, it's likely
8 or, you know, if they have a lot of storage on their laptop.

9 THE COURT: In your experience, then, the downloads
10 that you're dealing with are mostly on desktops and laptops?

11 MS. KENNEDY: Yes, I'd say -- I'm not going to say
12 it's completely impossible to do it on the phone or an iPad,
13 but given the amount of infringement in each case, it would be
14 highly unlikely.

15 THE COURT: All right. Let's put that aside now.

16 MS. KENNEDY: Yes.

17 THE COURT: You have a house with a desktop and two
18 or three laptops with a lot of storage on them.

19 MS. KENNEDY: Sure.

20 THE COURT: You get your report from IPP,
21 there's 31 downloads from the same IP address. They all have
22 the same BitTorrent program. Do you know how many devices in
23 the house were downloading your Strike 3's copyrighted works?

24 MS. KENNEDY: No.

25 THE COURT: Is there a way to find that out?

1 MS. KENNEDY: Usually, we don't find that out until
2 we've amended the Complaint, and when we amend the Complaint,
3 we have -- you know, we take all of the evidence and
4 information we have, once we have the subscriber's name and
5 form a good faith belief that either the subscriber or, you
6 know, maybe someone else is the infringer, we allege all of
7 that in our Amended Complaint, and once we get into discovery,
8 we do exchange lists of, you know, hard drives and devices
9 that could be used for a BitTorrent program, and that's part
10 of the regular course of discovery, just like any lawsuit.

11 THE COURT: Ms. Kennedy, my goal is not to trick
12 anybody. I just want the facts.

13 Do you know if there's a way when you get the -- do
14 you know if there's a way for IPP to identify how many
15 different devices downloaded Strike 3's works?

16 MS. KENNEDY: No, I don't believe that's possible.

17 THE COURT: Could you confer with the experts behind
18 you, just to confirm that's right?

19 MR. BANDLOW: We will let Mr. Bunting answer your
20 question to the extent he can elaborate on that --

21 THE COURT: Mr. Bunting, is that correct?

22 MR. BUNTING: If you had, let's say, three devices
23 behind one IP address in a home and they all had the same
24 BitTorrent program, that would show, basically, that they were
25 downloads to that same program. However, there is a client ID

1 associated that could be different between those three
2 laptops. So if there were three different client IDs, then it
3 could show that there were three different devices. So it's
4 possible.

5 THE COURT: So again, Ms. Kennedy, my goal is not to
6 trick anyone. You're saying there is a way to identify how
7 many different devices downloaded, say, in this case, the 31
8 works?

9 MR. BUNTING: If they had different client IDs for
10 the software, yes.

11 MS. KENNEDY: And, sorry, just to add on to that -- I
12 am familiar with his testimony. From my understanding, and
13 correct me if I'm wrong, a lot of the most popular BitTorrent
14 software programs, like uTorrent, they have sometimes in some
15 cases, they have different client IDs, but from my
16 understanding and from my conversations with IPP over the past
17 few years, the clients have actually adapted to make it more
18 difficult to determine the different fine IDs that come out of
19 it. So a lot of them are uniform now.

20 So I guess my answer to this question is, it may be
21 theoretically possible, but I don't think in every case you
22 can do it and I don't think in most cases you could do it.

23 MR. BUNTING: That would be correct.

24 THE COURT: So if I go and download a BitTorrent
25 program today on my laptop and tomorrow I download the same

1 BitTorrent program on my desktop, will they have different
2 identifiers?

3 MS. KENNEDY: They may or they may not. It depends
4 on the program and it depends on the version of the program.

5 Again, because these programs -- you know, the
6 creators of these programs, the real main point is to use them
7 for piracy, they're constantly adapting and trying to keep up
8 with ways to make it more difficult to detect the infringers
9 behind it. And from my understanding, I'd say the growing
10 number -- the growing trend and I don't know if it's 70, 80
11 percent now, have tweaked the program so the same client ID
12 spits out even if it's different versions.

13 THE COURT: In this particular case, there were 31,
14 during this timeframe, downloads, correct?

15 MS. KENNEDY: Correct.

16 THE COURT: Is it fair to state that Strike 3 doesn't
17 know how many different devices those 31 works were downloaded
18 onto?

19 MS. KENNEDY: That's correct.

20 THE COURT: Could be one, could be two, could be
21 three, right?

22 MS. KENNEDY: That's correct.

23 THE COURT: Would it be relevant to Strike 3's
24 conclusion that it's the IP subscriber who downloaded the
25 works to know how many different devices downloaded Strike 3's

1 works?

2 MS. KENNEDY: I mean, in the broad definition of
3 relevance -- any information that we can get is absolutely
4 useful, but I will say that generally from my experience, the
5 infringer, who's, you know, is going back for our content over
6 and over again is one person. You know, you don't often have
7 a situation where there's three people in the house and all
8 three people are downloading our movies. It's usually
9 one person who likes our content, who's decided not to pay for
10 it, so they're getting it through BitTorrent and, you know, if
11 they're doing it through one or two or three computers, it's
12 useful information because, you know, the more information you
13 have, the better, but it's not necessarily dispositive of
14 whether or not they're the infringer.

15 THE COURT: Does Strike 3 Holdings ask IPP
16 to try and identify that information, how many different
17 devices downloaded the works?

18 MS. KENNEDY: Absolutely.

19 THE COURT: Is that something you asked IPP?

20 MS. KENNEDY: Yes, yes. And from my understanding,
21 again, they've said, you know, there's this option where
22 sometimes you can identify it through the BitTorrent program
23 where it spits out a client ID, but because the BitTorrent
24 programs are constantly being updated to avoid detection,
25 they've realized that this is a singular identifier so they've

1 made it more uniform and adopted their --

2 THE COURT: What happened in this case?

3 MS. KENNEDY: In these four cases, I don't have

4 the --

5 THE COURT: No, no, no, I'm sorry.

6 MS. KENNEDY: -- the data.

7 THE COURT: Let's just focus on the one case.

8 MS. KENNEDY: I don't have the data in front of me.

9 I apologize, Your Honor. I'm more than happy to review it and
10 further brief you on it.

11 THE COURT: Who would have that -- would IPP or you
12 have that data?

13 MS. KENNEDY: Both IPP would and if I go back to --
14 if I -- I believe we do as well, but IPP
15 definitely does.

16 THE COURT: Is that some information you regularly
17 get when you decide whether to file a Complaint, how many
18 different devices were used to download Strike 3's works?

19 MS. KENNEDY: No, because again, it's -- from my
20 understanding, it's only in this one instance, and based on my
21 discussions with IPP over the last two years it's become
22 increasingly more and more unreliable because of the way these
23 BitTorrent programs are being updated. So, you know, they
24 pretty much told me it's not useful information to rely on,
25 because you just don't know.

1 THE COURT: Okay. Ms. Kennedy, let's go back to
2 where we were. Strike 3 gets this information from IPP,
3 in-house people analyze the data and they find out that this
4 particular ISP subscriber downloaded a lot of works, in this
5 case 31. What happens next?

6 MS. KENNEDY: So at that point, we do a number of
7 different things, you know, we run the IP address through
8 Maxmind to determine the approximate location of the IP
9 address, we look at a few different charts based on the
10 evidence that we do have. You know, we consider all of the
11 additional evidence that we've recorded that are infringing.

12 THE COURT: Let's not skip over that too fast.

13 MS. KENNEDY: Okay.

14 THE COURT: Is it infringing evidence just as to
15 Strike 3's works?

16 MS. KENNEDY: No.

17 THE COURT: So tell me what you're talking about.

18 MS. KENNEDY: Sure. So IPP records infringement in
19 two different ways. For us, you know, we've hired them to do
20 -- the forensically sound capture where they make a direct
21 connection with the defendant, they record forensically sound
22 PCAP evidence of the infringement being transacted and they
23 store that information.

24 They also have another program that is a general scan
25 of everything that's being downloaded on BitTorrent, and it's

1 a large database.

2 THE COURT: From this particular IP address?

3 MS. KENNEDY: From all IP addresses. And so once we
4 have an IP address that we know is a serial infringer that
5 doesn't look they're going to stop any time soon, we
6 cross-reference that IP address with their database and we're
7 able to see a list of everything else that they're
8 downloading.

9 THE COURT: Do they do that simultaneously or only
10 after you've identified --

11 MS. KENNEDY: It's simultaneously.

12 THE COURT: Okay.

13 MS. KENNEDY: And that's important, because, you
14 know, when you're looking at the data, it's not useful. You
15 know, once you've got an infringer that looks pretty serious,
16 then, you know, it's not very useful to start looking at
17 everything else they're downloading at that point. You want
18 to be able to go back in time and compare what else they are
19 downloading with the same period of recorded infringement as
20 our works.

21 THE COURT: So let's talk about the defendant in this
22 case. Somewhere there's a record of what IPP found, that they
23 downloaded aside from Strike 3's works?

24 MS. KENNEDY: Correct.

25 THE COURT: And in this case, what was that?

1 MS. KENNEDY: Off the top of my head, it's difficult
2 to recite from memory, especially not having the context of
3 knowing who the defendant is. So really being able to go
4 through and pull out the files that are meaningful, and --
5 but, again, off the top of my head, I think there's several
6 hundred files there.

7 So it's everything from like mainstream movies,
8 software, music, e-books, things like that.

9 THE COURT: Is this documented somewhere?

10 MS. KENNEDY: Yes.

11 MR. BANDLOW: Spreadsheets.

12 MS. KENNEDY: Yeah, in the database which we pull it
13 out through an API and have it on various different
14 spreadsheets.

15 THE COURT: So if we get into discovery in this case,
16 if the defendant wanted to request a record of everything that
17 you found, that would be available?

18 MS. KENNEDY: Yes, absolutely. And can I just maybe
19 give a better example just for context?

20 THE COURT: Absolutely.

21 MS. KENNEDY: So in a different case in the District
22 Court in New Jersey, I believe in front of Judge --

23 MR. ATKIN: Do you want me to -- it's my case.

24 MS. KENNEDY: Sure.

25 MR. ATKIN: We had another case where we have named a

1 defendant before Judge Mannion and we got into discovery
2 before it finally settled. And again, I'm just giving this as
3 an example. I don't have the evidence in front of us right
4 now, but one of the things that IP is able to get are the
5 different files that are being shared by the Doe.

6 THE COURT: I'm sorry?

7 MR. ATKIN: The Doe defendant. So in this particular
8 case, which is not this defendant, we knew a couple of things,
9 other than just the IP address and they were located in New
10 Jersey. We knew this Doe defendant was downloading movies
11 that had Korean language. We knew the Doe defendant was
12 downloading movies that typically fall on a stereotypical age
13 range of men rather than women, middle aged rather than young
14 or old. We also with this Doe defendant, we saw they were
15 downloading biomedical textbooks and of particular importance,
16 an ADA manual on how to run a dental practice. When we got
17 the subpoena response, the subpoena response went to a dental
18 practice. When we went on a public page doing our follow-up
19 investigation, which *Cobbler* allows, we saw that it was all
20 female employees, they were young, they were receptionists,
21 they were hygienists. There was one dentist. He was an Asian
22 American, he ran the company himself, and on that basis we
23 amended our Complaint and in the Amended Complaint we said
24 before what we knew -- and I know we were talking before about
25 equal plausible, equal probability. As the attorney assigning

1 the first Complaint, I know there is one computer, the rest
2 are hypothetical. I know there is one subscriber; the family,
3 the children, the wife, hypothetical. I could guess, maybe I
4 could look at suburban demographics, but I know for a fact
5 there's a subscriber, I know for a fact there's a computer,
6 and when I get this additional name and this additional
7 address, we can connect up the evidence we have, we can look
8 at their social media, we can say, look, we saw they were
9 downloading, the "Avengers: End Game" movie. We saw they were
10 downloading "Game of Thrones." This person on their social
11 media liked "Game of Thrones," liked "Avengers: End Game,"
12 they run a dental practice, they downloaded the ADA manual on
13 how to run a dental practice.

14 They would like mainstream movies. We would see the
15 same mainstream movies that would be publicly liked by the Doe
16 defendant. We would have a good faith basis at that point, we
17 believe, to amend the Complaint and proceed. And once we
18 amend the Complaint, we do get into discovery and we hope to
19 get the hard drives for the computers. It's likely that he's
20 the only person who is allowed to download adult films at his
21 business and if we find those same adult films on the
22 computer, then we know we have a match. But that's a
23 discovery issue. But that's what we use IPP's additional
24 evidence for.

25 We actually don't just get an IP address and we don't

1 just get an approximate location. We get a profile, sometimes
2 more accurate, this one happens to be very accurate, and we
3 loved when we got that ADA manual because it really, really
4 hit a chord of who else is looking to recreationally decide
5 what a dental practice runs.

6 THE COURT: There is some sort of profile information
7 on the IP subscriber in this case?

8 MS. KENNEDY: Yes, Your Honor. Again, we have the
9 full additional evidence, you know, with all of the different
10 files that they've been downloading. We can't put together a
11 profile yet because we don't know who they are, but as soon as
12 we do get the name, we immediately look at everything and, you
13 know, do our public investigation and we can say, okay, you
14 know, they're tweeting about this particular concert and I can
15 see, you know, at the same time on the additional evidence
16 that they're downloading the album.

17 THE COURT: Okay. You know what was downloaded at
18 this particular IP address?

19 MS. KENNEDY: Correct.

20 THE COURT: Not just Strike 3.

21 Before you file a John Doe Complaint, is anything
22 done with that information?

23 MS. KENNEDY: Yes. We review it and we make sure
24 that there's enough unique information on there so that once
25 we do get the name of the defendant, we can tie it to the

1 infringement, or not.

2 THE COURT: Who's "we"?

3 MS. KENNEDY: Myself, my legal team, and also I work
4 with my outside counsel on this, as well.

5 THE COURT: So, however many thousands of cases you,
6 your legal team or outside counsel look at, what was the works
7 that were downloaded from Strike 3, plus a record of what else
8 was downloaded?

9 MS. KENNEDY: That's correct.

10 THE COURT: And how do you decide whether to file a
11 Complaint or not to file a Complaint based on that
12 information?

13 MS. KENNEDY: Well, and also just to add to that, one
14 other piece of information we look at is based on the data.
15 We can tell down to about five minutes when they first
16 downloaded the movie and when they stopped distributing the
17 movie and we know that they actually have to be at their
18 computers at that time. So we can also piece together a
19 pattern of activity where we can tell when they're at home or
20 not at home. And we used that information as well to
21 determine whether we're going to file a lawsuit. In terms of
22 the additional evidence, we mostly look for unique identifying
23 factors. You know, "Game of Thrones" is a great example
24 because a lot of people like to talk about it on social media,
25 but it's also very common. So, you know, we're looking for

1 more individually unique things like the ADA Guide to Running
2 a Dental Practice was a great example. You know, we looked at
3 it and we said, we're going to get a dentist or a dental
4 office.

5 In other examples, we found people downloading their
6 car manuals. So we know, okay, whoever is driving this, you
7 know, 2017 Honda Accord is probably the infringer.

8 THE COURT: How about this case, offhand, do you
9 know --

10 MS. KENNEDY: I don't off the top of my head, but
11 again, I'm more than happy to go back and review the evidence.

12 MR. BANDLOW: We could produce that spreadsheet to
13 you right away that would show everything, if you wanted that,
14 Your Honor.

15 THE COURT: So someone reviews it --

16 MS. KENNEDY: Yes.

17 THE COURT: -- someone reviews the spreadsheet, the
18 list of the Strike 3 works that were downloaded. Is there
19 some type of check-off form that's used to say, we did this,
20 we did that, I sign off and approve this Complaint?

21 MS. KENNEDY: Yes.

22 THE COURT: Does it say why, or just, file or don't
23 file?

24 MS. KENNEDY: Again, it's number of infringements,
25 length of time, number of references on the additional

1 evidence, types of files, exit and entry swarms. So, you
2 know, we've got a period and pattern of time. The BitTorrent
3 program -- not in every case are we going to have, you know --
4 I can't say every case is rigid where, you know, we absolutely
5 have this. You know, we kind of look at the totality of the
6 circumstances and say, okay, you know, once we've got the name
7 of the subscriber, we can figure out who's the infringer and
8 move forward with our case.

9 THE COURT: On this form, does it say who approved
10 filing of the Complaint?

11 MS. KENNEDY: No, we don't have like a form where
12 someone signs off. We've just got different people who have
13 different job responsibilities and, you know, if there's a
14 problem, they will come to me. I am -- let's say, 60 to 70
15 percent of the time, I review everything myself, but I also
16 have a couple of other lawyers on my staff who I trust and I
17 have very good, you know, data analytics and paralegal people
18 and it's a team effort.

19 THE COURT: So hypothetically, somebody might
20 download 50 or 75 Strike 3 works, but because of this other
21 information that the company gets, it decides not to file a
22 Complaint?

23 MS. KENNEDY: Yeah, that's possible.

24 THE COURT: Does the situation ever arise where
25 Strike 3 decides to file a Complaint, I don't know, John Doe

1 Complaint, it gets the subscriber information, the identity,
2 does Strike 3, as soon as it gets that name, file the Amended
3 Complaint, or it does additional investigations?

4 MS. KENNEDY: It always does an additional
5 investigation. Under no circumstances -- everyone on my staff
6 knows that and I believe that would firmly be a Rule 11
7 violation to just turn around and file the Complaint.

8 THE COURT: Okay.

9 MS. KENNEDY: I actually have -- I have at least
10 three, three and a half people that spend more than 40 hours a
11 week investigating and learning all the information they can
12 to make sure that when we amend, it's rock solid. And we
13 even -- you know, I know the standards, plausibility, and Rule
14 11 has a strong good faith belief, but usually when we amend,
15 it's beyond a reasonable doubt, like, we've --

16 MR. BANDLOW: We err on the side of caution. If it
17 looks like this is a close call, we're done.

18 THE COURT: All right. So let me ask this question.
19 Are there situations the John Doe Complaint is filed, you get
20 the subpoena, you get the subscriber identity, you get the
21 name of the subscriber, you do your additional investigation,
22 we're not satisfied that the subscriber violates, we're going
23 to dismiss the Complaint?

24 MS. KENNEDY: Yes.

25 THE COURT: Are there statistics on how often that

1 happens?

2 MS. KENNEDY: Yes. Off the top of my head, I want to
3 say that roughly -- of all the dismissals that we make without
4 prejudice, you know, where we've decided not to move forward
5 with our case, I want to say it's roughly about 35 to 40
6 percent of the time, where it's just, you know what, this
7 isn't a battle that we want to pick, I don't feel comfortable,
8 let's pull back.

9 In most other cases and what's more common is, you
10 know, either opposing counsel will appear or we'll do the
11 research in the investigation and information will come
12 forward that -- it's a category that we call hardship and
13 either the defendant or the infringer is -- doesn't have the
14 resources to go through litigation, they're going through
15 something in their life, where we try to be -- I know, you
16 know, we actually do try to be very empathetic and we listen
17 to all the information that's given to us, so if, you know,
18 for some reason, we don't think that they could afford
19 litigation and they said they're going to stop and we can see
20 that the infringement stopped, so you know what, we're not
21 going to go forward with this.

22 Other times, they might be active duty military or
23 just have some other, you know, unusual circumstance where we
24 just say, okay, you know.

25 So there's that category of cases where we don't

1 move, as well.

2 THE COURT: Let's take New Jersey.

3 MS. KENNEDY: Sure.

4 THE COURT: I think most of the magistrate judges in
5 New Jersey, when they grant the motion for expedited
6 discovery, say, before the information is revealed by -- I'll
7 use Comcast as an example -- they have to notify the
8 subscriber and if they want to object, they can object.

9 MS. KENNEDY: Right.

10 THE COURT: Is it true that in most cases, you don't
11 hear from the subscriber?

12 MS. KENNEDY: No. I'd say -- I'd say I don't have
13 the statistics off the top of my head, but we hear from the
14 subscriber a lot. I'd say maybe 50 percent of the time.

15 MR. BANDLOW: But by "hear from the subscriber," do
16 you mean by their counsel or by them personally?

17 THE COURT: Either one.

18 MR. BANDLOW: Yeah. I mean, I think it's more likely
19 we hear from a counsel. Very likely that we hear from the
20 actual subscriber themselves. We do get those communications.

21 THE COURT: Approximately 50 percent of the time?

22 MS. KENNEDY: Yes.

23 THE COURT: Okay. Maybe you can clarify something
24 for me. This was an issue that came up in the Brooklyn case,
25 and I believe it was inadvertent, but I don't think this was

1 one of the cases that you did a great job notifying us of
2 cases. I have to believe it was just inadvertent that this
3 case wasn't on the list. So I'm with you, counsel.

4 MR. ATKIN: I believe it was after the date of the
5 letter too, Your Honor.

6 MR. BANDLOW: Yes, that was fairly recent.

7 THE COURT: This judge talked about statistics that
8 Strike 3 provided in response to the Court's request and it
9 talks about 143 cases were resolved, you settled 49, dismissed
10 94. Of the 94 cases that were dismissed, it says 50 were due
11 to Strike 3's inability to satisfy itself that Doe was, in
12 fact, the alleged infringer. Is that a correct statement of
13 what happened in that case?

14 MS. KENNEDY: That is correct, and just to add on to
15 that, again, we hold ourselves to a higher standard than is
16 necessary to proceed. We probably could have proceeded in,
17 you know, I don't know how many of those cases, but in a lot
18 more. But we're -- you know, as a plaintiff, I believe we
19 have an absolute right to decide what cases we move forward
20 with and which ones we don't. And, you know, as legal counsel
21 for my company, I don't want to move forward with a case
22 unless I have a very, very, very high degree of certainty,
23 which is much more than what the Federal Rules require.

24 I didn't think it was fair to be punished for that,
25 and for the Judge to basically deny our abilities to, you

1 know, protect our First Amendment -- or protect our copyrights
2 and file a lawsuit. I didn't think that was fair, especially
3 because we were just trying to be very honest and candid about
4 how we operate, and we are very cautious.

5 MR. BANDLOW: Yeah, and let me elaborate. He seems
6 to assume that we looked at 50 and went, boy, we got nothing
7 here, we better dismiss. That's not true. We looked at 50
8 and said, there's a lot here, but it's not slam dunk, and we
9 want the slam dunk ones. We don't want to use our time and
10 resources and inconvenience somebody if we don't really feel
11 very strongly about the claim.

12 So it's not 50 that we came back and said, boy, these
13 are just complete misses. They just didn't have enough.

14 MS. KENNEDY: And I believe that's every client's
15 right with a lawsuit, particular before you've amended the
16 Complaint and a defendant's answered. I've always had the
17 belief that there's an absolute right to decide whether to
18 proceed or not. And, you know, if we chose not to, again, I
19 don't think it's fair that we're punished and we can't, you
20 know, move forward with our claims in the future.

21 THE COURT: Are these same statistics available for
22 the District of New Jersey?

23 MS. KENNEDY: Yes, Your Honor.

24 THE COURT: Has any of these Strike 3 copyright cases
25 ever gone to trial?

1 MS. KENNEDY: We currently have one in the Western
2 District of Washington, D.C. that's probably the closest to
3 going to trial. We've -- the Judge just granted an extra
4 month of discovery, but at this point, we've -- I've gone
5 through depositions, expert witnesses. We're in a very
6 rigorous discovery motion phase. We're seeking the
7 defendant's hard drive, we've deposed the defendant, our
8 corporate representatives have been deposed, our tech teams
9 have been deposed and I expect it will go to trial in the
10 fall.

11 As for all of the other cases, again, we just started
12 filing these cases in October of 2017, which I know it's 2019
13 right now, it seems like a long time ago, but considering that
14 it often takes, you know, six months or so to even get the
15 name of the defendant and then move forward, a lot of the
16 cases are still in the early stages, so it just hasn't reached
17 the time to go to trial.

18 This Washington case in particular, I think, is one
19 of the first ones we ever filed. So that's just as an
20 example.

21 THE COURT: In the 50 cases that the judge in
22 Brooklyn talked about, do I take it that was -- well, you tell
23 me, was it after the Doe Complaint was filed or was it after
24 the amendment?

25 MS. KENNEDY: No, it was not after the amendment. We

1 chose not to amend the Complaint.

2 THE COURT: Okay.

3 MR. BANDLOW: We take that step very seriously, that

4 Amended Complaint step.

5 THE COURT: Okay. Well, what's done -- and I
6 apologize if you already covered this, after you get the
7 subscriber name -- maybe we haven't covered this. What is
8 done before Strike 3 decides whether to amend because
9 presumably, that was done in this -- no, it wasn't yet done in
10 this case.

11 MS. KENNEDY: Correct. So after we get the
12 subscriber's name, we've got three or four different
13 paralegals on staff who take the information. We use, you
14 know, a database system called Delvepoint, similar to
15 LexisNexis, Accurint, that gives us, you know, basic
16 information on the subscriber. We do a complete top-to-bottom
17 internet search to get a profile of the person to see what's
18 publicly available, that information. We never contact them.
19 We know that's not okay, but, you know, we see they are
20 LinkedIn, you see what they've posted on Facebook, Twitter, et
21 cetera, and again, you know, we basically research who they
22 are, we research who else is in the household, and we look at
23 all of our evidence and, you know, so if we've got a LinkedIn
24 profile and we see that they're a senior IT architect that
25 specializes in, say, a list of three different very, very

1 unique types of software.

2 An example, Solar Wind, it's like a high-tech network
3 analytic software. You see that -- see their profile, we pull
4 up our additional evidence, we look at the software they're
5 downloading and we see if there's any matches. You know, if
6 we see, oh, look, they're downloading the latest version of
7 Solar Winds, you know, okay, that's a piece of evidence that
8 makes us inclined to believe that it's the subscriber.

9 What else do we have? And we say, okay, it looks
10 like they work from home, you know, they work remotely. We
11 can tell that based on their LinkedIn and their job profile.
12 So then we look at the exit and entry swarms and we say, okay,
13 well, whoever is doing the infringement, was doing it during
14 the day, Monday through Friday. So that's a good -- that's
15 another piece of evidence that we have.

16 We look at their Facebook.

17 MR. BANDLOW: Their Twitter. They tweet that they
18 like our movies.

19 MS. KENNEDY: Yeah, we've had defendants who swear up
20 and down and we've got opposing counsel call us screaming and
21 yelling being, like, how dare you, you've got the wrong
22 person, drop the case now or we're going to destroy your
23 company. And we get the name and we look at their Twitter and
24 they're tweeting to Greg, our director, saying, Hey, love your
25 movies, but can you add this star and do it, you know, in this

1 way next month.

2 It's like, all right, well, that's another piece of
3 evidence that we think we've got the right guy. So we look at
4 all of that, we rate our evidence on a scale of 1 to 5.
5 Before we amend the Complaint we again have an attorney go
6 through all the evidence again. We look at the orders, we
7 look to see if there's a protective order in place, who the
8 opposing counsel is. If there's not a protective order in
9 place and there's an opposing counsel in the case, we reach
10 out to them and we say, hey, we think we've got a good case
11 against your client, can you file a protective order because,
12 you know, we know that you're going to want that. Now's your
13 time, we're going to amend the Complaint in a week. Give them
14 the opportunity, and then proceed like we would -- like anyone
15 would a regular case.

16 THE COURT: In this particular case, one of the
17 arguments that the John Doe makes is that if counsel accepts
18 service of process, you don't need to know the defendant's
19 identity. I think you made that argument, right?

20 MS. KENNEDY: I respectfully disagree.

21 THE COURT: Tell me why.

22 MR. BANDLOW: We can't do any investigation.

23 MS. KENNEDY: Because then you're moving forward with
24 the Complaint and you don't know if you're satisfying Rule 11
25 and you don't know if you've got the right guy, and you're

1 forcing to litigate blindly which is really, really hard.

2 MR. BANDLOW: That makes us proceed against someone
3 we may not know we have as good a case against. It's actually
4 not in the interests of the Rule 11 injustice. It makes us go
5 forward when what we're saying is we want to make sure it's
6 right to go forward and that information will help us do that.

7 THE COURT: I didn't say it was a good argument, I
8 said that you made the argument.

9 (Laughter.)

10 MS. KENNEDY: Your Honor, not once in all of the
11 other cases we've ever filed has there ever been an accusation
12 that we've done anything improper with the information that
13 we've received. We've had very sophisticated and extreme
14 security measures to look after the data, you know, everyone
15 has access to it is under a confidentiality agreement. We're
16 very, very careful. We don't ever contact a pro se defendant,
17 we don't send demand letters, we don't make phone calls, we
18 don't solicit settlements. All we do with the information is
19 make sure we've got a good faith Rule 11, you know, belief
20 that we can move forward.

21 THE COURT: Does Strike 3 have data, generally, macro
22 data about how much of its works is downloaded?

23 MS. KENNEDY: Yes.

24 THE COURT: Strike 3 has been at this for a couple of
25 years now.

1 MS. KENNEDY: Correct.

2 THE COURT: I think it's fair to assume it's public
3 knowledge that Strike 3 enforces its copyrights and -- like
4 the old Napster.

5 MS. KENNEDY: Sure.

6 THE COURT: When word got out that they were filing
7 lawsuits, you know, things changed. Do the statistics show
8 that these lawsuits have a deterrence effect? Are you able to
9 see that the number of downloads is decreasing as time goes
10 on?

11 MS. KENNEDY: Unfortunately not, and I don't believe
12 it's not because these lawsuits don't have an impact. I do
13 actually do believe that they have a major impact, but I
14 believe the infringement is increasing still, because our
15 company's popularity is growing and we're becoming more and
16 more mainstream and we've been, you know, with each -- every
17 few months we receive a lot more press and we're opening more
18 websites and we're doing more.

19 So, you know, we can see that our subscriber base is
20 growing, and just like our subscriber base is growing, I think
21 people are becoming more aware of our content so we're getting
22 more and more infringers as time goes on and our company
23 continues to grow.

24 I do believe it is having a deterrent effect because
25 the nature of the way that BitTorrent works. By downloading

1 these movies, you're distributing them at the same time. So
2 if I can isolate, you know, a hundred people every month that
3 are distributing a huge pile of our movies -- and I know for a
4 fact that when we fill a lawsuit, in almost every case the
5 infringement stops. It's the only thing in my entire
6 experience as an IP lawyer and working for the company
7 fighting piracy that actually works. The infringement stops,
8 and when that stops these people stop distributing our
9 content. And so I know that we're taking them off of
10 BitTorrent.

11 Is it the most perfect ideal situation in the world?
12 No. But is it the best option that we have right now? Yes.
13 And I do believe it is helping try to at least contain the
14 piracy that we have.

15 THE COURT: Are you only getting downloading
16 statistics from the United States?

17 MS. KENNEDY: Yes, IPP -- IPP monitors worldwide, but
18 the monthly data that I receive from them is for the United
19 States only. I could ask them for worldwide content, but my
20 main concern right now is in the United States because that's
21 where the majority of our subscribers are based.

22 THE COURT: The people who are downloading the
23 copyrighted works, are they getting them from subscribers?

24 MS. KENNEDY: That's a good question. And most
25 likely, yes, because, you know, the way our company works, it

1 operates like a Netflix, you know, where you can sign up for a
2 subscription, it's behind the pay wall. You pay 29.99 a month
3 and you get unlimited access to our catalog.

4 The -- you know, if the files are winding up on
5 BitTorrent, we know that it's probably coming from someone on
6 our website. We have a very, very sophisticated IT team that
7 runs our website. You know, we've got 20 million visitors a
8 day in some cases, and we've looked at, okay, can we isolate
9 who these people are that are putting the movies on BitTorrent
10 and kick them off our website and bring a lawsuit against
11 them.

12 We've run a few different tests. The best one is,
13 you know, it usually takes about, say, five minutes from when
14 we put a new movie on our website for it to wind up on
15 BitTorrent. So we've got an isolated universe of IP addresses
16 that logged into our website and downloaded that content at
17 that time.

18 The problem is, so IPP isn't able to record the first
19 IP address to see the work, because in order for them to
20 actually capture the infringement, it has to be out there
21 already and it's just very, very -- it's next to impossible to
22 get that first IP address. When we're looking at our world of
23 people who had access to it, we see a lot of the times IP
24 addresses that trace to China, Russia, Eastern Europe, Africa,
25 in some cases, Middle East, and we believe that, you know,

1 these pirate websites, like The Pirate Bay that people go on
2 to get the BitTorrent files, they run on advertising and they
3 make their money and they're almost in every case located
4 offshore in Russia or Eastern Europe, or somewhere, China, et
5 cetera. And what they do is they create these logins to our
6 websites, they get a throwaway Visa, Mastercard to sign up for
7 a subscription. They sign up to their website, get as many
8 files as they can. We isolate it, we try to kick them off as
9 soon as possible, but they've got like a whole team of people
10 doing this because they're making billions of dollars off of
11 this and it's just constantly going back and back.

12 And, you know, we can't just block off an entire half
13 continent of people to access our website because we think the
14 piracy is coming from there, and we also know they'll find
15 another way.

16 But that's, you know, that's basically the problem we
17 have.

18 MR. BANDLOW: It's Whack-a-Mole.

19 THE COURT: Is there anything unique about New Jersey
20 and downloading in the cases that you don't see in other
21 states?

22 MS. KENNEDY: Well, two things I'll say. One, I
23 really like my New Jersey counsel, so I like working with him,
24 but New Jersey does have a higher volume than most states. I
25 put it in the top four or five, and I think it's just based on

1 population. It's based on having people with a number of
2 degrees that are sophisticated and, you know, they're either
3 drawn to Philadelphia or New York City or Princeton --

4 MR. BANDLOW: San Francisco.

5 MS. KENNEDY: -- in some cases, but we do have more
6 infringement in New Jersey than we do, say, in Minnesota.

7 MR. BANDLOW: States with people with lots of tech
8 background.

9 THE COURT: Aside from the volume, in terms of, I
10 don't know, how it's downloaded or things you've learned
11 through your different investigations, is there anything
12 unique to New Jersey that you don't see other places?

13 MS. KENNEDY: No, not necessarily other than the
14 volume, I'd say.

15 THE COURT: And in terms of how you -- not you,
16 Strike 3 investigates and decides to file these cases and
17 motions, is it pretty much consistent with what you do around
18 the country?

19 MS. KENNEDY: Absolutely.

20 THE COURT: Okay.

21 MS. KENNEDY: And just to add, going back to the
22 Cobbler case when that came out, you know, that's obviously
23 9th Circuit precedent, we're located in Studio City,
24 California and we saw -- first of all, we already were -- we
25 already did have in place the investigation and the high

1 standard of when we amend the Complaint, but when the Cobbler
2 case came down, it's like, okay, you know, we know we're on
3 the right track and we're doing the right thing, but now we're
4 going to get even more serious, and under no circumstances
5 would we amend the Complaint and move forward unless we have
6 really compelling evidence. And even though Cobbler only
7 applies to the Ninth Circuit, we're going to apply this to the
8 rest of the country because we think this is a very serious
9 decision that we're going to listen to.

10 Going go back to, respectfully, Judge Orenstein's
11 opinion where he says, you know, in these 50 cases you decided
12 not to proceed, I'll also add, we have in a lot of our cases
13 the same opposing counsel over and over again. They know our
14 investigative process and they know kind of the things that we
15 look for and a lot of times, you know, when they get a new
16 client comes in, the client says to them, I just got this
17 subpoena from Strike 3, I think I might be in trouble. They
18 say, okay, make your Facebook private, delete your Twitter,
19 close down your LinkedIn, remove all of your information.

20 THE COURT: That would be spoliation, right?

21 MS. KENNEDY: Well, true, but again, it's not -- you
22 know, it makes our lives a little bit more difficult and,
23 again, we've got to get past that Rule 11 good faith reason to
24 amend, and if we don't have anything, but you can tell that
25 everything is private and they've been really careful, can we

1 say spoliation? I don't know. That's sometimes a case --

2 THE COURT: If it's deleted, not if they --

3 MS. KENNEDY: Right.

4 MR. BANDLOW: Make it more private so we can't get to
5 it.

6 MS. KENNEDY: Right.

7 THE COURT: I'm not sure that's spoliation.

8 MS. KENNEDY: But it makes it difficult. That's, you
9 know, again a reality that we deal with. Do I think that's a
10 reason for us not to be able to file other lawsuits and
11 protect our copyrights? No. But it is a reason that we don't
12 proceed against every case.

13 THE COURT: Let me just see if I can sort of
14 summarize, wrap up, maybe we will take a short break.

15 MS. KENNEDY: Sure.

16 THE COURT: Before Strike 3 files it's John Doe
17 Complaint, it has information as to Strike 3's downloads from
18 IPP and it also has sort of a history of what else that was
19 downloaded to that IP address.

20 MS. KENNEDY: Correct.

21 THE COURT: Anything else?

22 MS. KENNEDY: Again, it has, has the BitTorrent
23 program.

24 MR. BANDLOW: We know where it is because we can
25 Maxmind it.

1 MS. KENNEDY: Right, we know the location because of
2 Maxmind. We have an analysis of the entry and exit points for
3 the downloads and the distribution. So we have, like, a rough
4 timeframe of when that person is actually at their computer
5 committing the infringement. I think that's --

6 MR. ATKIN: And I just want to close the door, again,
7 going back to Your Honor's point about plausibility and
8 probability and preponderance. We know for a fact that there
9 is a subscriber and we know that they have a computer. We
10 don't know if there's a wife and child, we don't know if
11 they're in a suburb or city necessarily. We have a general
12 approximate location from geolocation techniques. So we have
13 that information as well. We know for a fact there's one
14 computer. We know for a fact there is one subscriber.

15 THE COURT: At least one computer.

16 MR. ATKIN: Well, again, we -- you know, you can have
17 a thousand computers in your home, but as the attorney sitting
18 looking at the Complaint, I know for a fact, rock hard
19 evidence there's one computer.

20 THE COURT: You know there's at least one computer.

21 MR. ATKIN: I know there's at least one computer, but
22 if you ask me are there two, I would throw my hands up and I
23 would say, I wish I knew.

24 THE COURT: Will there come a day, do you think, when
25 Maxmind or a company like that will be able to zero in closer

1 as to where the subscriber is located?

2 MS. KENNEDY: That's a good question. I hope so, but
3 I'm not overwhelmingly confident, because again, I believe the
4 people that create these file sharing programs are often one
5 step ahead of us and I think they're going to actively work to
6 make it as difficult as possible.

7 MR. ATKIN: I'd like to address one other thing with
8 that. I don't know that it's necessarily -- I don't want to
9 disagree with my client. I know in the briefing here one of
10 the arguments is brought up that Maxmind itself acknowledges
11 that you can't find an exact city and state address and they
12 say a line in there about, there's a, you know, we want to
13 avoid any potential misuse and we discussed what that could
14 possibly mean from Maxmind, and one of things that I think
15 could be a concern from a company like Maxmind is, you know,
16 if you have something that's not exactly precise but you're
17 given a latitude and a longitude, I know there are things in
18 the media of things called swatting, where you could call
19 someone -- a police department to someone's house because
20 you've decided they've yelled at you in a video game, you've
21 entered their IP address in. You decide, oh, well, Maxmind
22 showed me that exact location. So it's almost not a good idea
23 to have a database publicly available. I almost prefer the
24 system of having a court have the protected information of the
25 subscriber and say, you've got to satisfy the Court that

1 you've got the right person and you're doing it for a
2 appropriate purpose before I let you get a subpoena to find
3 out their name and address.

4 I don't actually want to live in a world where I can
5 just type in my IP address and it comes up publicly available
6 like my phone book and says, John Atkin lives here, and if you
7 want to go talk to John Atkin or do something to John Atkin,
8 you can absolutely find it right away. So while I don't know
9 where the state of the technology is, I think no one would
10 disagree with the concept that we have to come here, we have
11 to ask for a subpoena, because we are seeking information that
12 is protected and should be protected and should have some kind
13 of showing, which we're hoping that we've met.

14 MR. BANDLOW: And as a lifetime First Amendment
15 lawyer as well, there is some value to anonymity. And to be
16 able to pinpoint an internet speaker directly to their house
17 may raise some issues with that as well. So maybe that may be
18 the concern.

19 THE COURT: The subpoena's issued, Strike 3 gets the
20 name of the subscriber. Before it moves to amend the
21 Complaint, it does this social media investigation and reaches
22 a conclusion whether or not it's satisfied that the subscriber
23 is the person who downloaded, right?

24 MS. KENNEDY: Yes. And it does a little bit more
25 than just the social media investigation.

1 THE COURT: What is it?

2 MS. KENNEDY: We also look at the location of the
3 address so we can see whether or not it's, you know, a
4 residential home, whether it's a one-bedroom apartment,
5 whether it's a four-bedroom apartment, that sort of thing.
6 And we get a list of the people who reside there. And so we
7 can say, you know, there's only one person in this house, or
8 there's, you know, there's a family with a 19-year-old son,
9 27-year-old son. We're not sure if the 27-year-old son lives
10 at home or not. We've got matches that actually, you know,
11 match to one person in the house, but it could also possibly
12 be this person as well. Maybe they're both on BitTorrent but
13 only one person likes our content.

14 If we get to that situation, you know -- again, it's
15 a judgment call. We've got enough probably for a good
16 faith-base belief to proceed, if we've got matches and got
17 someone in the house. But if we're being super cautious, we
18 might say, you know, because it might possibly be someone
19 else, we're not going to proceed in this case.

20 MR. BANDLOW: And also, Your Honor, I would say that
21 oftentimes prior to amending we've been dealing with opposing
22 counsel that's been providing us with information as well,
23 too. So we have that as well. We get some sort of early
24 discovery from an opposing counsel and they'll say, hey,
25 here's a receipt, shows I was out of town, or things like

1 that. So we put that into the mix, too.

2 THE COURT: Okay. That clock is a little fast. It's
3 12:06. We've been going at this awhile. I would suggest,
4 let's take a 15-minute break, come back, and then we could
5 discuss how we're going to proceed for the rest of this
6 hearing. I don't think we're going to finish before lunch, so
7 maybe we could talk about an appropriate time to take a lunch
8 break. So we can stretch our legs for 15 minutes and for that
9 time we'll adjourn. Thank you.

10 RESPONSE: Thank you, Your Honor.

11 THE DEPUTY CLERK: All rise.

12 (RECESS TAKEN; 12:06 p.m.)

13 THE DEPUTY CLERK: All rise.

14 (OPEN COURT; 12:37 p.m.)

15 THE COURT: Please be seated. In discussing this and
16 thinking about it, I wonder if the best thing to do is to take
17 a break for lunch, come back at 1:45 and then we'll pick up.
18 I would anticipate we will hear from Mr. Bunting and Mr.
19 Pasquale. Ms. Kennedy, we will give you a break.

20 MS. KENNEDY: Thank you, Your Honor.

21 THE COURT: Because we really didn't get into the
22 technical issues yet, and I definitely want to have time for
23 counsel to do whatever questioning you want. It seems like
24 you have more technical questions than -- I was sort of
25 questioning on a different area.

1 MR. SCULL: Your Honor, I can't imagine I'm going to
2 have more than 10 or 15 minutes with either one of these two
3 witnesses, to be honest. I think Your Honor covered most of
4 what I was going to ask.

5 THE COURT: Okay, good. There's not a whole lot of
6 places to eat in Camden, but I know the cafeteria at Rutgers
7 across the street is fine. There's a great beer garden up the
8 street whose service is really slow, so you've got to be
9 really careful. They're really slow. But it's great food, if
10 you have time.

11 So why don't we take a break and we'll reconvene at
12 1:45, okay? Thank you very much.

13 RESPONSE: Thank you very much.

14 THE DEPUTY CLERK: All rise.

15 (RECESS TAKEN; 12:39 p.m.)

16 THE DEPUTY CLERK: All rise.

17 (OPEN COURT; 1:53 p.m.)

18 THE COURT: Good afternoon, please be seated. As bad
19 as I sounded this morning, I sound worse now.

20 (Telephone rings.)

21 MR. SCULL: Sorry about that Judge. I apologize,
22 Your Honor.

23 THE COURT: One of the questions this morning I don't
24 think I was clear on is whether Strike 3 had information
25 available to it that would enable it to identify how many

1 devices were associated with the IP address, with the port
2 number assist in that regard. This might be an answer for Mr.
3 Bunting.

4 MR. BUNTING: You can have a couple of devices
5 apparently show up, but that isn't to say one device doesn't
6 have more than one BitTorrent client running and they would
7 have different port numbers.

8 So even though you could have two different port
9 numbers and it would look like two different devices, it could
10 in reality be one laptop. I've had one person one time
11 actually have three running when I came in.

12 THE COURT: What's a port?

13 MR. BUNTING: A port -- what happens is you have the
14 IP address, it's like the address of your house, if you want
15 to look at it that way. And for each service that you have
16 running, it might be like your browser, where you're browsing
17 the internet you have a BitTorrent client running, e-mail,
18 they're assigned different ports, and so it's a way of
19 breaking up the internet traffic through these ports.

20 So a port is a number and it's assigned, let's say --
21 let's say BitTorrent has port number of 2207. So if you had
22 -- so that would tell you that BitTorrent was configured on
23 this machine, let's say, at 2207. This could tie it to this
24 machine, but another machine may have uTorrent running over
25 here on this one and it could have another, maybe 5405. That

1 could look like two devices, but in reality, it could be
2 running on one computer. So you can't be certain just by port
3 numbers how many devices are there either.

4 THE COURT: Is that something that Strike 3 looks at?
5 Maybe Mr. Pasquale should answer that.

6 MR. PASQUALE: As far as ports, not for this
7 particular litigation, no.

8 THE COURT: Not for this specific case we're dealing
9 with, right?

10 MR. PASQUALE: Correct.

11 THE COURT: Do you know if there was more than one
12 port for this case?

13 MR. PASQUALE: I do not.

14 THE COURT: Is that something you looked at?

15 MR. PASQUALE: No.

16 THE COURT: Why not?

17 MR. PASQUALE: I strictly look at IP address,
18 destination and source IP.

19 THE COURT: Do you work, Mr. Pasquale, on every
20 Complaint that Strike 3 files?

21 MR. PASQUALE: No, sir -- no, Judge.

22 THE COURT: So which complaints do you work on?

23 MR. PASQUALE: The ones that are assigned to me.
24 Mostly -- well, mostly for the Northeast.

25 THE COURT: It's done geographically?

1 MR. PASQUALE: Not necessarily. Cases are assigned.

2 THE COURT: How about New Jersey? Are you the only
3 person who handles New Jersey cases?

4 MR. PASQUALE: I believe so.

5 THE COURT: What do you do, Mr. Pasquale?

6 MR. PASQUALE: I have 30 years in the industry. I
7 primarily work with financial firms.

8 THE COURT: I'm sorry, I wasn't clear.

9 MR. PASQUALE: In this particular litigation?

10 THE COURT: My fault. This case.

11 MR. PASQUALE: So for this particular litigation,
12 what I do is, I investigate the PCAPs that are sent to me and
13 then I adhere my signature to the declaration to ensure that
14 the information on the PCAP is correct.

15 THE COURT: Explain for the record what a PCAP is.

16 MR. PASQUALE: So a PCAP is a packet capture file
17 that shows -- has a timestamp. It also has a source IP
18 address, a destination IP address, along with the protocol
19 that's being used and the action that's actually happening.

20 So a description on what's happening with that
21 particular packet.

22 THE COURT: It's alleged there were 31 downloaded
23 works in this case. Is there a PCAP for each of those works?

24 MR. PASQUALE: For each case, yes.

25 THE COURT: No, no, no. For each of the 31.

1 MR. PASQUALE: I'm not sure I understand the
2 question.

3 THE COURT: Does each work have a separate PCAP?

4 MR. PASQUALE: Yes.

5 THE COURT: So are there 31 PCAPs in this case?

6 MR. PASQUALE: For this particular case, I believe
7 there's four.

8 THE COURT: I'm not understanding it.

9 MR. PASQUALE: Okay. So what I'm calling a PCAP is
10 an actual file that has a bunch of transmissions on it. So
11 maybe you're referring to the transmissions, how many
12 transmissions there are within a PCAP.

13 THE COURT: Attached to the Complaint there's a list
14 of the 31 downloaded files, correct?

15 MR. PASQUALE: I don't have that documentation in
16 front of me.

17 THE COURT: Counsel has it.

18 MR. SCULL: I have it, if he would like to see it,
19 Judge.

20 THE COURT: Yes.

21 MR. SCULL: Are you talking about his declaration
22 that was filed with the Complaint?

23 THE COURT: The exhibit to the Complaint.

24 MR. SCULL: I have that as well. I can give them my
25 Complaint if they need it again.

1 MR. BANDLOW: And Ms. Kennedy may be able to expand
2 on this a little bit, too, since she's involved in gathering
3 that data.

4 THE COURT: Those are the 31 works alleged at issue
5 in this case, right? Look at Exhibit A.

6 MR. PASQUALE: Okay, yes.

7 THE COURT: Have you seen that chart before?

8 MR. PASQUALE: It is attached to the documentation
9 that's sent to me, but I primarily don't look at this. What I
10 look at is the actual PCAP where the data is being
11 transmitted.

12 THE COURT: Did you work on each of these 31 files?

13 MR. PASQUALE: I'd have to take a look at the
14 declarations, but if I signed them, yes.

15 THE COURT: What did you do?

16 MR. PASQUALE: What did I do against the PCAPs?

17 THE COURT: For example, let me pick out a number.
18 No. 5. Okay? What did you do with regard to work No. 5?

19 MR. PASQUALE: Someone needs to help me out.

20 MR. BANDLOW: He's talking about one of the works
21 alleged in the Complaint. I think his belief of the expanse
22 of what you did is different than what he did.

23 MS. KENNEDY: Your Honor, just to clarify, 7 Rivers,
24 which is the company that Mr. Pasquale works for, he only
25 exams the PCAP for the first line in each Complaint.

1 THE COURT: Well, that's what I'm trying to get at.
2 I don't know why Mr. Pasquale doesn't understand my questions.
3 They may not be as literate as he would like, but I want to
4 make sure he's not avoiding answering my questions.

5 MR. PASQUALE: I'm not avoiding any answers.

6 MS. KENNEDY: And just to explain the purpose of
7 that. All we ask his company to do is open up the PCAP that
8 IPP gives us and confirm that the IP address is correct and
9 that the date and time is correct, because that PCAP and that
10 piece of information on that line is the most important,
11 because when we send the subpoena to the ISP, that's the
12 information that they use to look up the subscriber. So we
13 want double verification that that information is 100 percent
14 correct so there's no errors going to the ISP.

15 We do have a PCAP for all of these. In fact, I'd say
16 with 31 downloads, we probably have, like, two or three
17 hundred PCAPs because we collect more than just the one hit
18 per movie, and we certainly provide that during discovery, but
19 for purposes of serving the subpoena, the date and time on
20 that first line is most important for us, because that's
21 what's being utilized to look up the defendant.

22 THE COURT: Which date and time?

23 MS. KENNEDY: On Line 1. Yes.

24 THE COURT: Which date and time are you referring to?

25 MS. KENNEDY: The UTC, date and time.

1 THE COURT: What does that stand for?

2 MS. KENNEDY: That stands for the date and time that
3 the infringement occurred.

4 MR. BANDLOW: Universal Time Code, I think --

5 MS. KENNEDY: Right. That's Greenwich Mean Time. So
6 we use UTC so that there's no error in translation when it
7 comes to time zones.

8 THE COURT: Is that the time that IPP --

9 MS. KENNEDY: Correct.

10 THE COURT: -- checks it?

11 MS. KENNEDY: Yes.

12 THE COURT: Mr. Pasquale, what do you do?

13 MR. PASQUALE: What I do is I take a look at that
14 particular PCAP where that timestamp is and confirm that a
15 transmission occurred at that time between the source and
16 destination IP address.

17 THE COURT: How do you do that?

18 MR. PASQUALE: Through a program called Wire Shock.

19 THE COURT: And what does that tell you?

20 MR. PASQUALE: It tells me the source, destination,
21 IP address and that a file has been transferred.

22 THE COURT: Why do you only do it for the one work?

23 MR. PASQUALE: I'm trying to understand the term
24 "work."

25 THE COURT: That's what it's called. It's not my

1 chart, it's Strike 3's chart. Work.

2 MR. PASQUALE: Okay. For each particular work,
3 there's one work to one declaration.

4 THE COURT: Work No. 5 on the chart, do you see that?

5 MR. BANDLOW: On Exhibit A. He's talking about this
6 right here. That one.

7 MR. PASQUALE: Okay.

8 THE COURT: Did you do anything with regard to Work
9 No. 5?

10 MR. PASQUALE: Yes.

11 THE COURT: What did you do?

12 MR. PASQUALE: What I did was exactly what I
13 described before. I took a look at the PCAP that was sent to
14 me, and compared it to the declaration, then adhered my
15 signature to it.

16 THE COURT: Did you do that for each of the 31 works?

17 MR. PASQUALE: Yes.

18 THE COURT: Well, your general counsel or the general
19 counsel of Strike 3 --

20 MR. PASQUALE: It is --

21 THE COURT: Hold on, hold on. I ask the questions.

22 -- might have a different understanding of what
23 happened. Is that right, Ms. Kennedy?

24 MS. KENNEDY: Yes. And I think the confusion here is
25 he looks at the PCAPs that we give him and --

1 THE COURT: I want to know -- Mr. Pasquale submitted
2 declarations with the Court, okay? I want to hear what Mr.
3 Pasquale has to say, not what you have to say, okay?

4 Mr. Pasquale, you're not under oath. I can put you
5 under oath. I'm assuming that's not necessary.

6 You said you looked at all 31. Ms. Kennedy says no.
7 What's the story?

8 MR. PASQUALE: I'm under the assumption that these
9 are all the PCAPs that I looked at. So I may have overstated
10 my answer.

11 THE COURT: Do you have any independent personal
12 recollection of working on this case?

13 MR. PASQUALE: No.

14 THE COURT: Did you do anything to prepare for this
15 hearing?

16 MR. PASQUALE: I took a look at the declarations that
17 were sent to me.

18 THE COURT: Did you read your declarations?

19 MR. PASQUALE: Yes. They're basically the same.

20 THE COURT: And do your declarations say anything
21 about you doing work on all 31 works?

22 MR. PASQUALE: No.

23 THE COURT: Then why did you tell me you did work on
24 all 31?

25 MR. PASQUALE: As I stated before, I was under the

1 assumption that these works were associated with my
2 declarations. I do hundreds of declarations a month, so it's
3 very difficult for me to say, yeah, I remember that one, when
4 you just -- I look at a series of numbers.

5 THE COURT: The information that you received, did
6 you receive it directly from IPP or from Strike 3?

7 MR. PASQUALE: From Strike 3.

8 THE COURT: Were you given any instructions when you
9 did your work?

10 MR. PASQUALE: No.

11 THE COURT: What did you understand your assignment
12 to be?

13 MR. PASQUALE: My assignment is to confirm the
14 transmissions for particular IP addresses going back and
15 forth, and then adhering my signature to the declarations,
16 stating that that information is true.

17 THE COURT: Do you personally sign the declarations?

18 MR. PASQUALE: Yes, I do.

19 THE COURT: You know a lot more about this than I do.
20 Did you receive and analyze the PCAP for any of the works
21 listed from 2 to 31, on Exhibit A?

22 MR. PASQUALE: Without going through the
23 declarations, I really can't answer that question.

24 THE COURT: Didn't you look at the declarations to
25 prepare for this hearing?

1 MR. PASQUALE: There was four declarations that were
2 sent to me.

3 THE COURT: Did you sign them all?

4 MR. PASQUALE: I signed them, yes, except for one.

5 THE COURT: So is it -- in your view, is it too
6 onerous to remember what you put under oath in four
7 declarations?

8 MR. PASQUALE: It's very difficult --

9 THE COURT: I don't mean to be snide, but I'm just
10 shocked that you're here today and you can't answer these
11 basic questions.

12 MR. PASQUALE: You're asking me to look at a series
13 of numbers and references and compare it to a declaration that
14 I've done maybe nine, ten months ago.

15 THE COURT: I'm asking you to be prepared in a
16 Federal Court hearing to determine what should be done in this
17 case, Mr. Pasquale. That's what I'm doing, okay? That's what
18 I'm doing. I'm not here to trick anyone or play games. I
19 want to know the facts.

20 Is there information that you were given regarding
21 Works 1 to 31 that is not included in Exhibit A?

22 MR. PASQUALE: I don't know if I could answer this
23 question without looking at the documentation that I've
24 signed. Just looking at a spreadsheet with numbers doesn't
25 help me much.

1 THE COURT: Does IPP's system identify the port used
2 by the BitTorrent client?

3 MR. PASQUALE: Not that I know of.

4 THE COURT: What do you think about that, Mr.
5 Bunting?

6 MR. BUNTING: It does.

7 THE COURT: So you disagree with Mr. Pasquale?

8 MR. BUNTING: I know it tracks the port number.

9 THE COURT: So in your view, Mr. Bunting, IPP
10 system will identify the port used by the BitTorrent client?

11 MR. BUNTING: The port is listed in the PCAP.

12 There's two different layers. There's the IP layer which
13 lists the IP address, and underneath that there's the
14 transport layer or TCP layer and that's where the port is
15 specified. I think what happens in his case, he doesn't look
16 at the next layer down because he doesn't need to, that's not
17 part of what he's doing.

18 MR. PASQUALE: That's correct.

19 THE COURT: Do you get the name of the -- do you get,
20 Mr. Pasquale, do you get the name of the actual BitTorrent
21 that was used?

22 MR. PASQUALE: No.

23 THE COURT: Is that available?

24 MR. PASQUALE: Not that I know of.

25 THE COURT: Mr. Bunting, you agree with that?

1 MR. BUNTING: The name of the torrent file itself?

2 THE COURT: Right.

3 MR. BUNTING: Is in the report, yes.

4 THE COURT: So that is available.

5 MR. BUNTING: Yes.

6 THE COURT: Mr. Pasquale, do you get the version
7 number of the BitTorrent software?

8 MR. PASQUALE: I may, but I don't focus on it. I
9 don't look for that.

10 THE COURT: Is that available?

11 MR. PASQUALE: I'm not sure.

12 THE COURT: Mr. Bunting?

13 MR. BUNTING: Yes.

14 THE COURT: Is any of that information helpful to
15 identify who's downloading the work?

16 MR. PASQUALE: Is that a question for me?

17 THE COURT: Well, let me ask Mr. Pasquale.

18 (Laughter.)

19 THE COURT: I'll start with you.

20 MR. PASQUALE: The way you would be able to identify
21 it is by ISP only.

22 THE COURT: So you think it's irrelevant to
23 identifying the actual person who downloaded, to know the port
24 used by the BitTorrent client, the actual name of the
25 BitTorrent and the version number of the BitTorrent?

1 MR. PASQUALE: It's irrelevant to me, yes.

2 THE COURT: Mr. Bunting, is that information helpful
3 to identifying who downloads the work?

4 MR. BUNTING: Eventually, it would be.

5 THE COURT: Is that information looked at, Ms.
6 Kennedy?

7 MS. KENNEDY: Yes.

8 THE COURT: Before the Complaint is filed?

9 MS. KENNEDY: Yes.

10 THE COURT: Before the John Doe Complaint?

11 MS. KENNEDY: Yes.

12 THE COURT: Who looks at that?

13 MS. KENNEDY: Either I do or someone in my in-house
14 team.

15 Just to clarify, Mr. Pasquale, all we ask him to do
16 is confirm the date, time, and IP address to make sure that
17 the ISP is doing the correct lookup. In terms of looking at
18 the actual data that comes from IPP, I do that with my team.
19 We don't ask him to do that. You know, his role is simple.
20 We want to make sure the lookup is being done correctly.

21 In terms of putting together all the information to
22 identify the infringer, yes, we do that in-house, but that's
23 not something that, for us, at the beginning stages of the
24 Complaint we thought was necessary to go into a declaration,
25 or have an outside expert confirm exists. It's something that

1 we certainly consider and look at.

2 But again, we just wanted 7 Rivers to make sure that
3 the lookup is being done correctly so there are no errors
4 there.

5 MR. BANDLOW: Mr. Pasquale comes in at the stage
6 where we're asking for the subpoena of the ISP to make sure
7 that we are asking for the correct time, date, and relevant
8 information, so that when the ISP looks up who was the
9 subscriber at that's moment, we know we're asking for the
10 right moment, that we've been careful to check that we're
11 asking the ISP to check that moment who was the subscriber.

12 THE COURT: But you're only asking Mr. Pasquale to
13 look at one of 31 works?

14 MR. BANDLOW: Yes. So that, so that we -- well, or
15 it may be a few more, but we want to pinpoint a moment when
16 that address was downloading something, because IP addresses
17 are dynamic sometimes, they could change. But we know at that
18 moment, that address was downloading something. We want to
19 know who the subscriber was at this moment.

20 THE COURT: Why doesn't Mr. Pasquale do the same
21 investigation for Works 2 to 31?

22 MR. BANDLOW: I think you should answer that better,
23 yeah.

24 MS. KENNEDY: Because the ISP only wants one date and
25 time to do the lookup. They don't go through and say, okay,

1 there's, you know, 31 works or 50 works, we're going to look
2 up every single hit date. They want one that's recent in
3 their data retention and that's what goes on the subpoena.

4 MR. ATKIN: Your Honor, if I could -- I'm sorry.

5 THE COURT: Are you, then, on the subpoena asking --
6 I keep on using Comcast -- to identify the subscriber on
7 July 27, 2018, at UTC 75726?

8 MS. KENNEDY: Correct.

9 MR. BANDLOW: Exactly.

10 THE COURT: And that's the information you get back,
11 right?

12 MS. KENNEDY: Correct.

13 MR. ATKIN: Your Honor, if I could just add one thing
14 to this. This is a little bit litigation strategy. I
15 actually ask in the beginning why we didn't subpoena the name
16 for all 31 cited in this case, in this case that I asked
17 about. And I actually, when I contacted with Verizon about
18 this, they said, we can do that, but it's going to cost a lot
19 more money for you. They charge us sometimes a fee to hold
20 the information or to respond to the subpoena.

21 So if we have a hundred works, I don't know if it's
22 exactly \$35 off the top of my head, but they could say, you
23 could ask for the most recent, get the one that you have, and
24 then go through discovery to find out if the other ones are
25 supported, or you can spend \$3500 and get every single one and

1 go through discovery and see if you've got it there.

2 So we could subpoena all of that, but we, when Your
3 Honor -- I don't know if you have a copy of the subpoena in
4 front of you, we want to know that one date in time so that
5 Verizon isn't going through every single record.

6 THE COURT: But this is -- just so I'm career, this
7 is the date and time that IPP is on BitTorrent, right?

8 MS. KENNEDY: Yes. Every single one of those
9 infringement dates listed on that Exhibit A is when IPP
10 reported the defendant infringing, and we have even more. You
11 know, we just list on the Complaint only one instance per
12 work, but sometimes there's 50 or a hundred instances per
13 work. They report a lot of data. But again, you know, not
14 only is it an issue of the ISP charging us every time, but it
15 would take them forever -- you know, if we asked them for
16 every single infringement on the Complaint to look it up, some
17 of our -- you know, this case only has 31. I believe another
18 case before us has 89. We've had cases that go up to two or
19 300. The ISPs would simply, they would take months, if not,
20 you know, like six months or so to even get the information
21 back to us and it would delay the case forever. You just
22 simply -- it's just not practical.

23 THE COURT: Is it correct that IP addresses sometimes
24 change?

25 MS. KENNEDY: Yes.

1 But we also do look at evidence to the best that we
2 can try to make sure that that's not happening in our cases,
3 when we file Complaints.

4 So -- and that goes back to, for example, the
5 BitTorrent program. If you see it's the same BitTorrent
6 program from, you know, June 1st all the way to the following
7 August, you know, a year and two months later, you've got a
8 pretty good indication that it's not switching IP addresses.
9 You can also look at the additional evidence. If you see that
10 they're downloading "Family Guy," you know, Episode 1, 3 -- or
11 2, 3, 4, 5, 6, you know, over the course of several months,
12 you get the idea it's not dynamic. So we actually do screen
13 for that.

14 On occasion, we have had a few instances where the IP
15 addresses have come back dynamic and it's not so much that the
16 infringer has switched midway and it's a different person, but
17 it's actually that, you know, they're infringing on two
18 different IPs, so we sue the same person twice. And in that
19 case, you know, obviously, we will dismiss one of the suits
20 and that's sometimes why we dismiss. It's pretty rare, but
21 then again, we screen for this stuff.

22 THE COURT: So Work No. 1, July 27, 2018, there's
23 work No. 28 is December 3rd, 2017. Approximately eight months
24 previous. Is it assumed that it's the same subscriber for
25 those eight months?

1 MS. KENNEDY: Yes, because again --

2 MR. BANDLOW: Not just assumed, backed up by some
3 evidence.

4 MS. KENNEDY: Right. Because the odds that two
5 different people using the same IP address, trace it to the
6 same area, downloading our movies at the -- with the same
7 BitTorrent client, and also, you know, consistently
8 downloading the other movies on the additional evidence.

9 (Interruption.)

10 (Off the record.)

11 MR. BANDLOW: Your Honor, if I could, just one thing,
12 just because we want to make sure that whatever -- that this
13 is very clear what everybody does in this case.

14 So IPP does its investigation and think of it this
15 way, when an infringement is happening, they take a snapshot
16 of it and that snapshot says this work was transmitted on this
17 date and at this time, here's my snapshot. He looks at that
18 snapshot to make sure it says that time, that date, that work,
19 to confirm that that information is accurate before we use it
20 as a basis to get a subpoena. So it's a very limited role.
21 He's not looking at every single PCAP we have, just those to
22 make sure that we can trust what IPP in Germany is telling us
23 that they've taken that snapshot and it contains that
24 information.

25 THE COURT: Ms. Kennedy, are you familiar with the

1 term "bit field value"?

2 MS. KENNEDY: Yes.

3 THE COURT: Is that information Strike 3 has?

4 MS. KENNEDY: Yes.

5 THE COURT: Does it get it from IPP?

6 MS. KENNEDY: Yes.

7 THE COURT: Is that examined?

8 MS. KENNEDY: Yes.

9 THE COURT: Before the John Doe Complaint is filed?

10 MS. KENNEDY: Yes.

11 THE COURT: What is the significance of that?

12 MS. KENNEDY: The bit field value reflects the
13 percentage of the movie that has been downloaded, and it does
14 it through --

15 THE COURT: Downloaded by the subscriber?

16 MS. KENNEDY: Downloaded by the infringer.

17 THE COURT: Okay. I'm sorry.

18 MR. ATKIN: Learned that one.

19 (Laughter.)

20 MS. KENNEDY: And so it reflects the percentage by
21 examining -- so just to take a step back, the way BitTorrent
22 works is it breaks a movie file up into, you know, a hundred
23 or a thousand pieces and each piece has its own unique hash
24 value to it and they all, you know, have a certain order as to
25 where they go in the movie and once you download all of the

1 pieces, BitTorrent, re, you know, re-puts them back together
2 like a puzzle and the movie works.

3 So the bit field value tells you which number is
4 connected to the pieces. So if you've got a hundred pieces in
5 the case and you've got a bit field value that goes -- that
6 says, you know, 99 or a hundred, you know that they've got a
7 full copy of the movie.

8 MR. BANDLOW: They very likely downloaded all of it.

9 THE COURT: What were the bit field values of the 31
10 works?

11 MS. KENNEDY: Again, I don't have that data in front
12 of me so I can't say for sure for every single work, but I do
13 know that as a general filter, we make sure that there's a bit
14 field value that has at least I want to say between 50 and 70
15 percent, so that we know that there is a substantial portion
16 of the movie there. And just because a bit field value, you
17 know, say for one work has 73 percent, it doesn't mean that
18 they didn't get the whole movie, it just means that IPP wasn't
19 able to get that piece from them showing that they had the
20 higher bit field value.

21 But we do examine the bit field values to make sure
22 that in every work downloaded, there is a substantial
23 percentage of it, so they can't come back and say, oh, it was
24 just the de minimus value and, you know, I downloaded it for
25 two seconds just to get a couple of pieces but I had no

1 intention of watching the movie, so then I got rid of it.

2 So we do consider that information.

3 THE COURT: If the bit value is less than a hundred,

4 is it playable?

5 MS. KENNEDY: Yes. From my understanding, it is.

6 THE COURT: In every case?

7 MS. KENNEDY: I can't say for sure in every case.

8 THE COURT: Mr. Bunting, what do you say? You're the
9 expert.

10 MR. BUNTING: Depends on the tool you're using. Some
11 -- some viewers require a full file or some of them will play
12 partials.

13 THE COURT: When IPP downloads -- well, goes on
14 BitTorrent, is it downloading directly from the IP subscriber?

15 MS. KENNEDY: Yes.

16 THE COURT: But it's not downloading if there's a
17 movie, as I understand it, it's not downloading a hundred
18 percent of the movie from the subscriber.

19 MS. KENNEDY: That's correct, and this is something
20 that I've worked with -- for IPP for many months trying to
21 figure out if there's a way to get that full copy of the movie
22 from the subscriber.

23 Again, it's something that's theoretically possible.
24 I think, you know, they maybe did like a hundred different
25 trials and I think they succeeded once, but it's very, very,

1 very difficult because again, just the way BitTorrent works,
2 it's meant to be efficient. So you're meant to not get the
3 whole file from one person, you're meant to get it from as
4 many people as humanly possible to increase the speed so you
5 can get it as fast as possible. And just with the technology
6 that exists today, in some very rare cases, they can do it,
7 but it's -- it's just not something they can do on a regular
8 basis or across the board.

9 THE COURT: So let's take Work No. 5 as an example.
10 IPP goes on BitTorrent, and this particular IP subscriber has
11 downloaded that movie. Some of that downloaded movie is going
12 to go to IPP, right?

13 MS. KENNEDY: Correct.

14 THE COURT: And some of it is going to come from
15 other people who downloaded the movie, right?

16 MS. KENNEDY: That's correct, and we can't record
17 that.

18 THE COURT: And does the BitTorrent -- when IPP
19 eventually downloads, say, a complete copy of Work No. 5, does
20 it know how much of that download came from the particular IP
21 subscriber that we're concerned about?

22 MS. KENNEDY: I'm not -- I'm not sure if I completely
23 understand your question.

24 THE COURT: Okay. Maybe -- I'll ask it this way.
25 Suppose a movie is an hour.

1 MS. KENNEDY: Okay.

2 THE COURT: IPP downloads the entire movie.

3 Different portions of that movie came from different people.

4 MS. KENNEDY: Right.

5 THE COURT: Some of it came from this particular IP
6 subscriber. Is IPP able to tell how much of the movie came
7 from this particular subscriber?

8 MS. KENNEDY: Yes. Yes. So they certainly, when
9 they're tracking this infringement, they download -- they
10 download the movie once for the purposes of having that
11 controlled copy, but when, you know, they certainly get it
12 over and over and over again, because they're tracking as much
13 infringement out there as possible. But with our data, we
14 have every single transaction where they connected with the
15 infringer labeled and what you can tell is the bit field
16 value.

17 So, you know, they're trying to connect with the
18 infringer as much as possible over and over and over again.
19 Again, because the infringer is connecting with other people,
20 they can't get them every time, but they -- you know,
21 oftentimes the data will be like, you know, you see the bit
22 field value and there will be like 5, 17, 30, 75, 89, 99 and
23 that's, you know, five or six different times that they've
24 connected with the infringer and they've gotten those
25 five pieces, which might not be, you know, a huge portion of

1 the entire movie, but they can see that the infringer is
2 getting all of the pieces from everyone else.

3 THE COURT: Does IPP or Strike 3 know whether the
4 subscriber has downloaded the complete copy of, say, Work No.
5?

6 MS. KENNEDY: The best way we can tell is from the
7 bit field value until of course we get into discovery and look
8 at their hard drives.

9 THE COURT: So the bit field -- does the bit field
10 value tell you how much of the movie the IP subscriber has
11 downloaded?

12 MS. KENNEDY: Yes. But again, just to qualify that,
13 if, you know, the last time IPP was able to connect with the
14 subscriber, it only has a bit field value of 45 or 77, it
15 doesn't mean that the subscriber only got to 77 percent, it
16 just means that IPP wasn't able to connect with it for those
17 remaining pieces.

18 THE COURT: So Strike 3 doesn't know whether or not
19 before discovery, whether the subscriber downloaded the
20 complete work?

21 MS. KENNEDY: We don't know for sure whether they
22 downloaded the complete work, but we have a good faith basis
23 for believing that they do, because we can see the progression
24 growing in the bit field value. And again it, goes back to,
25 you know, taking a step back. The purpose of using BitTorrent

1 is to get the complete work and if they're getting -- if
2 they're going on BitTorrent and getting it 31 times, there's a
3 pretty reasonable inference that it's working and they're
4 getting the movies. If they're going back for more and more
5 and additional new releases, something is working because, you
6 know, there isn't really a whole lot of point for just getting
7 a bunch of random unplayable pieces on your computer.

8 THE COURT: Under BitTorrent, is it broken up into
9 hashes or hash values?

10 MS. KENNEDY: Yes. So there's a hash value for each
11 piece and there's a hash value for the movie itself.

12 THE COURT: Are you able to -- "you," Strike 3 or
13 IPP, or anybody, able to tell how many of those hashes or hash
14 values that IPP downloaded came from the subscriber?

15 MS. KENNEDY: Sure. Again, with our data, every
16 piece of evidence that we have has a hash with it, and they
17 all came from the subscriber, because that's the IP address
18 that was identified.

19 So yes, you know -- and again, like, for one work, we
20 could have 300 connections or we could have five connections,
21 but each connection has a hash value related to that
22 particular piece that we received and the bit field value.

23 THE COURT: In the information that we have in front
24 of us that's in the record in this case, can we tell how many,
25 in terms of seconds or minutes of each work was downloaded

1 from the subscriber's IP address?

2 MS. KENNEDY: Possibly, but again, just based on the
3 nature of the way BitTorrent works, you know, if they
4 connected, it would depend first of all how many pieces are
5 broken up into a file. So, you know, if you have 10 pieces
6 out of a hundred, you know, and it's -- it's a 60-minute long
7 movie, you know that that's what -- not very good at math, but
8 I'd say that's about six minutes.

9 But at the end of the day it goes back to the bit
10 field value and, you know, the reasonable assumption that it's
11 not possible to get the full copy of the movie from the
12 subscriber. It's not even really possible to get 50 percent
13 or 40 percent directly from the subscriber because BitTorrent
14 is designed to not do that. It's --

15 MR. BANDLOW: That would never happen.

16 MS. KENNEDY: It just goes completely against its
17 function.

18 But you can tell the progression and you can see that
19 they are getting more and more of the -- more and more of the
20 movie as IPP's, you know, recording the infringement going on.
21 And, you know, it goes back to the reasonable assumption why
22 else would they be getting just pieces of a movie. It doesn't
23 make sense.

24 THE COURT: How many pieces are in a movie?

25 MS. KENNEDY: It would depend on the movie how

1 many --

2 THE COURT: Approximately. What's an average?

3 MS. KENNEDY: That might be a better question for
4 Steven. I want to say it could be anywhere between like a
5 hundred or a thousand or maybe 10,000.

6 THE COURT: Mr. Bunting, do you know?

7 MR. BUNTING: I'd have to do some math in my head
8 here. Let's see.

9 THE COURT: How about copyrighted Work No. 1.

10 MR. BANDLOW: You have to know it's a 4K, it's a
11 high-quality movie, so that changes the pieces.

12 MR. BUNTING: Let's say if it was four gigabytes or
13 say two and a half, let's just work in round numbers, and
14 there are 250 megabytes per piece, so what's that, 410? Or
15 depending on how -- the torrent size will be broken down into
16 pieces, but according to the best way it can be transmitted.
17 So it's not always the same size pieces. So it's really
18 difficult to give you an answer like that.

19 But say, 20, 30, 40, 50. Just depends on the chunk
20 size they use.

21 THE COURT: Mr. Tobias Fieser, if that's how you
22 pronounce it, of IPP, he gave a declaration that said that
23 defendant's IP address, quote, Was documented distributing to
24 IPP servers 216 pieces of Strike 3's copyrighted movies from
25 December 3, 2017, until September 6, 2018, okay? That's what

1 he said.

2 216 out of how many? Is that a lot? Is that a
3 little? Is that 30 seconds? Is that 10 minutes? Is that an
4 hour? Do we know?

5 MR. BUNTING: Again, I don't know. You would have to
6 look at each movie as the number of pieces assigned that were
7 broken up and then when it was actually created into a
8 torrent, and that's going to vary on the size of the movie
9 somewhat with a BitTorrent client who's doing it.

10 THE COURT: I'm trying to understand the significance
11 of 216 pieces.

12 MR. BUNTING: Pieces.

13 THE COURT: That's what he said. I don't know if
14 that's a lot, if that's a little.

15 MR. BUNTING: How many works does that represent?

16 MR. BANDLOW: It's all 31 works.

17 THE COURT: Do you know, Ms. Kennedy?

18 MS. KENNEDY: Here's what I would say to that. I've
19 got 216 pieces documented over six-month period regarding 31
20 works. Again, with the way BitTorrent works, they're not
21 connecting to IPP for every single time that they go to get a
22 piece. There could be -- there could be a thousand pieces
23 we're talking about, but what it's showing is that IPP's
24 connecting with them over and over and over again. So think
25 about how many other people this particular infringer is

1 connecting with at the same time.

2 I think what it represents is that this infringer is
3 committing a lot of infringement.

4 IPP can't get every piece. They can't get the full
5 copy from the infringer every single time. But if they're
6 getting -- if they're connecting with them this many times, it
7 means the infringer is on a lot -- spending a lot of time on
8 BitTorrent stealing people's content.

9 THE COURT: Let me turn to a different area, Ms.
10 Kennedy.

11 Does Strike 3 send out DMCA notices?

12 MS. KENNEDY: Yes. There's two types of DMCA
13 notices. There's the DMCA notices that go to the torrent
14 websites, to Google, to the websites. We work with a company
15 called X Takedowns and we've been doing it long before I
16 joined, I would say August 2015, and we've sent sometimes as
17 much as tens of thousands of DMCA notices per week.

18 We send -- I think, you know, there's a Google
19 transparency report you can go in, type in "Strike 3 Holdings"
20 and it will pop up, you know, a good portion that we've sent
21 to Google, and I think there's over a million.

22 THE COURT: What category of people do you send
23 the notices to?

24 MS. KENNEDY: We're sending them to the infringing
25 websites like The Pirate Bay. We're saying, hey, get our

1 content off there, you know, we don't want people accessing
2 this. There's, you know -- yeah, there's probably like a
3 couple dozen torrent sites that we send to routinely. We send
4 them to Google itself to delist them from the actual Google
5 search. So if you type in Vixen torrent, you know, you'll see
6 the freshest ones because they're always up. But if you go
7 down in the search engine, there should be: These links have
8 been removed based on DMCA notices. We also do it with tube
9 sites and file lockers and anything else that could possibly
10 be infringing -- or hosting our infringing content.

11 THE COURT: What's the purpose of sending out the
12 notices? Hopefully --

13 MS. KENNEDY: It's -- I mean, we do it because --
14 because if we don't, we're giving up. But it doesn't work.
15 And it's not just us. Like the entire content industry will
16 say that the DMCA process is broken because, you know, a lot
17 of these torrent websites, again, they're outside U.S.
18 jurisdiction. They don't care about the DMCA. You know, go
19 ahead and sue me, I'm in Russia. I'll pop up again in
20 somewhere else. You know, as soon as you get Interpol
21 coordinated with the FBI and spend a year and a half, and, you
22 know, a million dollars to get me taken down, I'll pop up the
23 next day somewhere else. They just don't care.

24 But you have to send DMCA notices, because if you
25 don't, you're giving up.

1 THE COURT: Does Strike 3 send DMCA notices to
2 individual subscribers?

3 MS. KENNEDY: We have. We did for a period when I
4 first started. We used a company called Rightscorp, which, to
5 my knowledge is the only company that -- I know the Motion
6 Picture Association and the RIAA have different companies that
7 they work with, but Rightscorp was the only company I could
8 find that would do this for us, considering that we were
9 adult.

10 We worked with them for a couple of months. It
11 didn't do anything, and here's -- well, two things. One,
12 Rightscorp went out of business. So, you know, we didn't
13 really -- it just wasn't really a viable option for us.

14 But two, it didn't seem to work and the reason is
15 because when you send a DMCA notice through an ISP utilizing
16 that sort of process, the ISP automates everything. It's not
17 like a subpoena where they have a human go and plug in that
18 line, you know, that line 1, and look up the information and
19 then send, like, a certified letter to the defendant saying,
20 hey, you're involved in a lawsuit, you're in trouble, this is
21 serious.

22 Instead, what they do is, they just automatically
23 pass on the DMCA notice to whatever e-mail address they have
24 on the account, which nine out of ten times goes to the spam
25 inbox or it's just completely ignored because there's no

1 penalty.

2 MR. BANDLOW: Or, Your Honor, in the BMG Cox
3 litigation that was recently happened, it was shown that Cox
4 just wasn't even sending them, that they were throwing them in
5 the trash. They weren't even sending them to their
6 subscribers. So, yeah, you have to rely on -- because again,
7 the DMCA notice doesn't technically go to the subscriber, it
8 goes to the service and it says to the service, you've got a
9 bad guy using your service, you better, A, tell them to stop,
10 and B, if you get a bunch of notices from us that you got a
11 bad guy, you got problems because you're not doing the things
12 you need to do under the DMCA to protect yourself. So you
13 have to trust that they'll transmit this
14 tell-your-guy-to-stop-message and they often don't.

15 THE COURT: Was notice sent out in connection with
16 the defendant in this case?

17 MS. KENNEDY: No, because I believe we filed this
18 case in 2018 and it was after we stopped working with
19 Rightscorp.

20 THE COURT: So is the company, does it continue --
21 excuse me, continue to send out DMCA notices?

22 MS. KENNEDY: No, I think they've completely shut
23 their doors.

24 THE COURT: No, Strike 3.

25 MS. KENNEDY: Oh. We don't have a mechanism to send

1 them out through the ISPs because we just don't have a company
2 that will do that for us. But we do send them out to the
3 torrent sites themselves and on the webs, because we have a
4 company that does that. And that's just a lot more common and
5 easier to do.

6 Again, you know, to go through these ISPs, you have
7 to have a connection with the ISPs, you have to -- it's just
8 -- for us, we just haven't found that option.

9 MR. BANDLOW: And just to be clear, and I know you
10 didn't mean to be unclear about your question, but we can't
11 send a DMCA notice to a subscriber. We can send it to the --
12 to Cox or Comcast because they know who that is and we hope
13 that they say something, but we could never send it to a
14 subscriber, we don't know who they are.

15 THE COURT: So the question would be, wasn't notice
16 sent to whoever the --

17 MR. BANDLOW: Comcast, Cox, et cetera. The answer to
18 that is no, it was not.

19 MS. KENNEDY: The other reason we kind of gave up on
20 this process is I followed very closely, for many years, the
21 efforts by the Motion Picture Association and the RIAA, and
22 they worked with all the main internet service providers to
23 create the system called Six Strikes. And that's essentially
24 what it was, was, you know, you send the notice to Comcast and
25 Comcast has this six strikes system in place where they will

1 send an e-mail to the subscriber and after the second or
2 third, it gradually, you know, the warnings get more and more
3 intense or severe and I think after the sixth strike they'll
4 maybe slow down the internet for 10 minutes and, you know, a
5 red stop sign will flash.

6 They did this and they invested an enormous amount of
7 resources in it. They did it for four or five years and they
8 waved their white flag and said, this is a colossal failure,
9 it's not stopping infringement. If anything, infringement's
10 gotten worse because we're limited in our resources here and
11 the subscribers are, like, oh, nothing's going to happen, so
12 you know what, now I'm definitely going to infringe because
13 there's just no penalties.

14 THE COURT: Does Strike 3 take any other action aside
15 from filing these copyright suits to prevent or deter
16 downloading of its copyrighted works?

17 MS. KENNEDY: We've looked into a number of different
18 solutions. You know, we've taken a bit of a different path
19 with tube sites, for example. There's a lot of tube sites out
20 there that were pirating our content and we were able to have
21 some pretty heavy negotiation with them, you know, in
22 settlement discussions, where it's like, if you don't cut it
23 out and filter out this infringing content and start paying us
24 some royalty, we're going to sue you type discussions, and
25 we've come to voluntary agreements with various tube sites

1 where they'll pay us a royalty, they'll only have full copies
2 of our movie behind pay walls, they'll get rid of all the
3 infringing content. Voluntary agreements like that.

4 As for BitTorrent, we send the DMCA notices to the
5 BitTorrent sites. To the extent that works, you know, I don't
6 know.

7 But we've talked about -- you know, I was --
8 candidly, off the -- well, but, you know, two weeks ago, I was
9 speaking with the head of antipiracy for Universal Music Group
10 and we're talking about collaborative efforts that we could
11 look at together, you know, against some of the bigger
12 players. But when it comes to doing major, major lawsuits
13 like, you know, the record industry or the motion picture
14 industry, we don't have those resources. Unfortunately, our
15 industry doesn't have those resources. So we're doing
16 everything that we can.

17 Going back to what I said earlier, this is the only
18 way that I've experienced that actually makes the infringement
19 stop.

20 THE COURT: Does Strike 3 have available to it any
21 avenues in state court to deter or prevent the downloading
22 that it could use against someone like the defendant in this
23 case --

24 (Interruption.)

25 MS. KENNEDY: To answer your question, regarding

1 state court, I would have to say maybe. It's something that I
2 actually do have my legal team researching, but I don't --
3 Strike 3 hasn't -- I don't know for sure.

4 MR. BANDLOW: It's still a litigation remedy. It's
5 just a way of getting to some information a little quicker and
6 easier, but it would ultimately be so that you can bring a
7 litigation from it.

8 MS. KENNEDY: We're exploring as many different
9 outlets and laws out there that, you know, we can utilize to
10 try to do this.

11 THE COURT: Well, the reason I ask that is because
12 part of Strike 3's argument, why it needs the discovery in
13 this case is there's no other way to get it.

14 MS. KENNEDY: Right.

15 Traditionally, you know, we -- traditionally, we look
16 at it as copyrights, you know, it's a federal question, it's a
17 federal right. You know, the Cable Communications Privacy Act
18 says that in order to get the name and address, name of the
19 infringer, you need a court order, because copyright is a
20 federal issue, we should file in federal court. To the extent
21 that some state courts may have various different discovery
22 type complaints available, I don't know if -- I don't know if
23 it would work -- I don't know if it would be proper or not.

24 It's certainly something we're looking into it, but
25 as of right now, all I know is that the Federal Court is the

1 only way for sure.

2 MR. ATKIN: Your Honor, and also, I don't mean to
3 actually help out the other side too much, but it allows for a
4 bit of a uniformity, too, in the procedure, not that these
5 other cases, you know, we were discussing control us
6 necessarily, but it would be more of an issue if we had, well,
7 New Jersey allows you to do X and Pennsylvania allows you to
8 do Y. It makes it a much more -- bigger procedural hurdle for
9 even defendants to figure out where they're at, whereas if
10 we're operating under the same Federal Rules maybe with local
11 rules it allows a little bit more of uniformity to know what
12 we're expecting.

13 THE COURT: Well, I think I have talked enough so far
14 today, and if there's no objection, I was going to turn the
15 floor over to defense counsel.

16 MR. SCULL: Your Honor's covered just about
17 everything I would have asked in my questioning of Mr.
18 Pasquale and Mr. Bunting.

19 The only thing, I do want to make a couple of
20 arguments that -- and that's this: I've heard a lot of --
21 I've heard a lot of, well, you know, we just suppose that it's
22 somebody at that address, we suppose. And in the beginning of
23 this, of this hearing, Your Honor hit on a lot of key points
24 and that is, all you have is one snapshot in time. You don't
25 know how many people are on that IP address. There's

1 absolutely no way of telling who was there, when they were
2 there, what they were doing when they were there, what torrent
3 program or which individual using the torrent program
4 downloaded any of this content.

5 THE COURT: Is that a trial issue, though?

6 MR. SCULL: Is it a trial issue? I don't know that
7 it is.

8 THE COURT: Look at the procedural context that we're
9 in now. We're not here to decide the merits of the case.

10 MR. SCULL: Correct, correct.

11 THE COURT: We all know that, we all agree on that,
12 okay?

13 Are your arguments directed more to the merits of the
14 underlying case?

15 MR. SCULL: Well, that argument is, Judge, I guess
16 you could look at it that way. And Your Honor asked questions
17 about the packets and the moments in time. You know, IP
18 addresses change all time. They admit it as much in their
19 testimony. IP addresses change, subscribers change. This IP
20 address that we're looking at here could have gone through
21 four or five different subscribers, but they only looked at
22 one packet of information.

23 In all of these files that they alleged were
24 downloaded by this IP address, they looked at one packet of
25 information, one snap, one moment in time.

1 This could have been more than one moment in time.
2 It was obviously more than one moment in time and there could
3 have been a different subscriber at packets No. 2 through 31.
4 It doesn't necessarily mean it's the same subscriber.

5 So -- or the same subscriber had that IP address in
6 all of those snapshots.

7 With respect to the DMCA notices, Mr. Bandlow said,
8 well, you know, we don't send to 17 individual subscribers, we
9 would send them to the ISPs. But they didn't send any to the
10 ISPs in any of these case. They didn't send them to the ISPs.

11 THE COURT: Is that true?

12 MR. SCULL: They didn't send them to Comcast.

13 MS. KENNEDY: For the DMCA notices, again, it goes
14 back to we tried to do it with Rightscorp, they went out of
15 business.

16 THE COURT: So there's no DMCA notice send to Comcast
17 advising Comcast, stop subscriber 76.116.361.90 from
18 downloading?

19 MR. SCULL: Or, and I quote, we will have a bigger
20 problem with you. That's exactly what Mr. Bandlow said. They
21 could have sent these DMCA notices to Verizon, to Comcast,
22 whoever these ISPs were, but they didn't do it.

23 And, you know, the other thing is, they could have
24 stopped the downloading of the content right at the beginning
25 had they sent the DMCA notices. No, instead, they let IPP

1 go for a period of six months knowing that at some point in
2 time, there was content and allow more content allegedly to be
3 downloaded, when they could have in the beginning of this sent
4 the DMCA notice to Comcast saying, your subscriber at this IP
5 address is downloading this information and we want it
6 stopped.

7 THE COURT: So let's take whatever you said as true,
8 accept it at face value. How does that impact the Court's
9 decision whether they should get the discovery they request?

10 MR. SCULL: Part of their argument is that they
11 cannot stop the theft of their content without actually filing
12 suits to do so. That's the crux -- that's the crux of their
13 argument. We have to file suit to stop all of these
14 infringements when, in the beginning of this, they could have
15 sent the DMCA notices, notified -- and according to --
16 according to Ms. Kennedy, you know, it's effective if you put
17 somebody on notice, they see that the content infringement
18 stops. They could have stopped that content infringement in
19 the beginning, had they put them on notice. That's my point.

20 THE COURT: Do they -- you would understand the
21 statute DMCA better than me at this point.

22 Suppose they ask Comcast to send these notices and
23 Comcast ignored them. Does Strike 3 have any relief against
24 Comcast?

25 MR. SCULL: If Comcast -- I think they would if

1 Comcast allowed the conduct to continue. Honestly, Your
2 Honor, I don't know, but I don't know why they wouldn't have
3 relief. If Comcast knew that this was occurring and had
4 notice that this was occurring and allowed it to continue to
5 occur, why wouldn't they have a right against Comcast?

6 THE COURT: Can I just stop you there. I'd like to
7 hear Ms. Kennedy's or counsel's answer to this question.

8 MR. BANDLOW: Yeah.

9 THE COURT: Suppose the notice is sent to Comcast,
10 DMCA notice, stop subscriber, et cetera, et cetera, from
11 downloading our copyrighted works. Comcast takes the letter,
12 puts it in the drawer and does nothing. Does Strike 3 have
13 any relief?

14 MR. BANDLOW: We had relief before that. So, let me
15 back up, because I'm a little bit of a DMCA expert, so I want
16 to give you a bigger picture.

17 The DMCA in these cases is a gigantic red herring,
18 total red herring.

19 THE COURT: The defendant doesn't think so.

20 MR. BANDLOW: Everybody brings it up, it's a complete
21 red herring. The DMCA was enacted to deal with
22 intermediaries, solely. The DMCA was enacted to, quote
23 unquote, save the internet because what was happening was
24 people like YouTube were allowing user-generated content to be
25 posted to their sites so that people could exchange

1 information. But, of course, what do people start immediately
2 doing with YouTube? Loading up other people's copyrighted
3 works. And that -- if a regular YouTube site showing a video
4 is a copyright infringement, so the content provider -- the
5 YouTubes of the world went to Congress and said, look, if
6 we're going to get sued every time a user uploads content,
7 it's going to kill the internet. And Congress said, you're
8 right. So what we're going to do, we're going to give you,
9 intermediary, a safe harbor. The DMCA gives you a safe harbor
10 and it says, look, you won't get sued for copyright
11 infringement as long as you have the notice in takedown
12 provision. As long as you allow people to say, hey, that's my
13 content somebody ripped off and put up on your system, please
14 take it down, and you follow that.

15 If you have that process in place and you follow it,
16 you get some immunity from copyright infringement liability.
17 It has zero to do with that ultimate uploader and downloader.
18 They're the direct infringers, they have liability no matter
19 what. So we're not required to do DMCA notices so that we can
20 go sue BitTorrent infringers. The legislative history makes
21 it a hundred percent clear that you don't have to do DMCA
22 notices to preserve your right to go sue the ultimate
23 downloaders and distributors. All DMCA does is say to
24 Comcast, we're not going to kill you if some other people --
25 like using the phone, it's like if I defame somebody over the

1 phone, you don't get to sue AT&T; they were the conduit. Same
2 thing here, Comcast gets to say, I'm just a conduit and as
3 long as I'm willing to take your notices and take stuff down,
4 I should get some immunity.

5 So the fact that a DMCA notice was or was not sent
6 here really is entirely irrelevant. It doesn't stop us from
7 suing his client or anybody else that's distributing and
8 downloading our works.

9 That being said, the answer to your question is, if
10 we keep sending notices to Comcast and develop evidence that
11 they're taking them and chucking them in the trash or doing
12 like Cox was -- in the BMG case, Cox was doing this, all
13 right, we've got ten notices on this guy, your service is cut
14 off. Five minutes later, it's back up. That's what they were
15 doing. They said, we've cut you off, okay, five minutes
16 later, back on.

17 Because the cable companies don't want to sort of get
18 rid of their subscribers, that's where their money comes from.
19 So there is an issue there. The point is, yes, if Comcast
20 kept getting and ignoring them, then they've blown their safe
21 harbor and we could, theoretically, go sue them, but it would
22 have nothing to do with whether we can go get the ultimate
23 downloaders that Comcast is servicing whatsoever.

24 So DMCA notice is really a red herring. It doesn't
25 prevent us from going after anybody we want to go after who's

1 sitting in the basement downloading all our works and
2 distributing them to the world.

3 THE COURT: Suppose Comcast -- let's take the exact
4 opposite situation. Comcast gets the notice from Strike 3 and
5 says, I want to stop this. I don't want one of my subscribers
6 downloading copyrighted works from Strike 3. What can it do?

7 MR. BANDLOW: They can shut them off. Say, you no
8 longer can use our service. They could send warnings, that
9 would help, but of course those get ignored.

10 We have a case right now that we're litigating where
11 the defendant got DMCA notices to their internet service
12 provider and ignored them. They ignore them. But, yes, if
13 Comcast, Comcast could shut them off, they would go get
14 another subscription service somewhere else. But, yes, they
15 could cut them off. And empirically, as I said, through
16 litigation it's been found, they're not.

17 THE COURT: And under the statute, they would get
18 immunity from that.

19 MR. BANDLOW: They're motivated to -- and, in fact --
20 look, a lot of the Comcasts of the world -- it's funny, we
21 keep using Comcast. Comcast is great in terms of getting us
22 subpoena responses and stuff because they know, they want to
23 give us information and not blow their DMCA immunity.

24 THE COURT: I want to just say for the record, you're
25 the first person I ever heard say --

1 MR. BANDLOW: Comcast is great? Well, it's not my
2 subscriber, so I don't know how awful it is.

3 THE COURT: Spoken from someone who had a Comcast
4 issue yesterday.

5 MR. BANDLOW: The point is, is that they get that --
6 if there's an appearance to people like us that, eh, we're not
7 taking your infringement stuff seriously, they risk blowing
8 their immunity. So there may be some motivation to look like
9 they're taking it seriously, but there's the other motivation
10 of, to really truly take it seriously, we're going to have to
11 ding a lot of our customers and we're not so sure we want to
12 do that. So it's not really effective.

13 THE COURT: So is Strike 3's beef with whoever their
14 provider -- ISP is, people like Comcast, and not this
15 unidentified subscriber?

16 MR. BANDLOW: No. Our beef is with the three to
17 400,000 different people a month that are downloading and
18 distributing our content. That's our beef, because the
19 Comcasts of the world aren't going to stop it. What we have
20 found is, the way to stop it is to send the message that, if
21 you download and distribute our content, it's going to put you
22 in court.

23 MR. ATKIN: Your Honor, if I could add something to
24 this. I just noticed an interesting intersection between this
25 morning, what we were talking about, subscribers versus

1 infringers. What we're hypothetically talking about is
2 wouldn't it be wonderful if we had a tool, we could write to
3 Comcast -- I don't know if you're a Comcast case, but we could
4 say, you know, this subscriber has an IP address, we think
5 there's an infringer there, shut the internet down in their
6 house, and Comcast would run out and say, heavens no, shut it
7 down.

8 In your hypothetical case, Judge, where there is a
9 father and a mother and three kids and one of those is a
10 college-aged son who's doing the downloading, we've just
11 unilaterally come out and shut down the internet for an entire
12 family, where under our version, if we did DMCA notices, yes,
13 they would start to hear about it and maybe if men were
14 angels, they would say oh, I've gotten a DMCA notice, I need
15 to get my own house in order, I need to find out who is doing
16 it, I'm not going to just throw it up in the garbage.

17 But our version of it and the real world version we
18 have is, we know a subscriber exists, we know a house exists,
19 we know a computer exists, and we'd like to get some more
20 information to find out if it is the son. We just don't want
21 to shut the internet off. We don't want to just say, hey, we
22 know that it's happening out of this IP address, turn that
23 thing down. Because there's hypotheticals out there where it
24 could not be that exact situation, and I think that's -- I
25 just wanted to raise that as an interesting parallel.

1 THE COURT: Is there something short of discontinuing
2 service that Comcast could do?

3 MR. ATKIN: Well, I think Mr. Bandlow talked about
4 that you could send notices, which sounds to me would be short
5 of just shutting down the lights.

6 MR. BANDLOW: And the other thing to keep in mind, if
7 you're saying, well, you know, if Comcast could do X and
8 Comcast could do Y, and that should solve the problem, you're
9 basically saying, so the infringer gets a free pass. The
10 infringer gets a pass. Because we know the infringer did
11 something bad, that's why Comcast is saying cut it out.

12 You're basically saying all these people get to
13 infringe and we have no remedy against them, and the Congress
14 specifically said the opposite. You still have that remedy
15 against those individual infringers, regardless of DMCA.
16 You're not -- DMCA isn't a free pass to the infringers, it's a
17 free pass to the conduit and that's all.

18 MR. ATKIN: It would also be interesting to add, this
19 is not so much to brown nose the Court, but such a series of
20 events would remove the Court's oversight. It would be
21 private company Strike 3 calls up private company Comcast and
22 says, we're threatening you, take down this internet, send out
23 threatening notices, no judicial oversight whatsoever.

24 The fact that we're having this hearing today shows
25 that the due process rights are there, that we have to go

1 through this. You know, I hate to sound like the founding
2 fathers are so great, but this inefficient system, we have to
3 show up, we have to file a Complaint, we have to show good
4 cause, we have to convince the Court that good cause is there.
5 I think there's a value to that.

6 THE COURT: We're going to turn the floor back.

7 MR. SCULL: Remember what they argued in the
8 beginning? They're only interested in the most egregious
9 people that do hundreds, hundreds of downloads in a month.
10 That's what they told you, that's what they said. But the
11 bottom line here is, Judge, you stop that right away if the
12 you send something to the ISP. If you send something to the
13 ISP, you can stop that -- you can stop it in its tracks. So
14 those arguments really ring pretty deaf.

15 And then you have your remedy with the Court which is
16 one or two downloads. I mean, really, that's what -- that's
17 on -- those two arguments, I'm sorry, but they just don't fit.

18 THE COURT: Can the ISP remove from a subscriber's
19 computer downloaded copyrighted work?

20 MS. KENNEDY: No.

21 THE COURT: Ms. Kennedy, you're shaking your head.

22 MS. KENNEDY: No, Your Honor, I don't believe they
23 can because the ISP doesn't have access to an individual's
24 computer, it just has access to their internet.

25 THE COURT: When you settle your -- when Strike 3

1 settles its cases, what does it do about the works that have
2 already been downloaded?

3 MS. KENNEDY: It depends. I mean, in most cases --
4 in a lot of cases they've already deleted them by the time it
5 gets to settling. But generally, of course, you know, we do
6 ask that they remove it. But at the end of the day, if
7 they're settling and they promise to never do it again, and
8 are aware of the consequences and they're settling, you know,
9 we're not going to go on to their computer and say, get rid of
10 all the movies you have, because that's just --

11 MR. BANDLOW: I've done most of the settlements, so I
12 can add to that. I think the vast majority of our settlements
13 at least the default terminology is, you are to destroy and
14 get rid of any content. I've had occasional opposing counsel
15 that have said, you know, my guy's paying you some money, can
16 we keep this stuff? And we said, okay, it makes some sense to
17 that, if he's paying a significant chunk of change and he
18 wants to keep it, I guess he can. But usually, they agree to
19 an order that they have to destroy it.

20 THE COURT: Does Strike 3 verify that it's been
21 destroyed?

22 MR. BANDLOW: I don't know that we've been aggressive
23 about sort of verifications. Our key -- look, our primary
24 objective is to make sure they don't do it again.

25 THE COURT: On Strike 3's websites, does it give

1 notice of its copyright claim?

2 MS. KENNEDY: Yes, there should be under the terms
3 and conditions, this content is copyrighted.

4 There should be a page on the website that lists this
5 information and states that it's copyrighted.

6 THE COURT: How many different websites does Strike 3
7 have that works are downloaded from?

8 MS. KENNEDY: We currently have five websites. In
9 this -- in this case, in this Complaint at the time it was
10 filed, we only had three or four -- actually, sorry, we
11 currently have six websites. I believe there's only three or
12 four at the time this Complaint was filed.

13 THE COURT: Is Strike 3 able to tell from which
14 website the download came from?

15 MS. KENNEDY: Yes, because each website has specific
16 types of movies and you can tell based on the movie which
17 website it came from.

18 THE COURT: Does Strike 3 use the same copyright
19 notice on each website?

20 MS. KENNEDY: Yes.

21 THE COURT: Tell me, is it on the bottom of the page,
22 the home page, or every page?

23 MS. KENNEDY: I believe it's on our terms and
24 conditions. It should be on the bottom of the page. I know
25 -- I've certainly asked them to put it on the bottom of the

1 page, but I can't say off the top of my head right now whether
2 it's on the bottom of the page.

3 MR. BANDLOW: It's in the terms of use when you sign
4 up for an account.

5 MS. KENNEDY: And like whenever we sell a DVD,
6 because we're also the No. 1 seller of adult DVDs. At the end
7 of the thing it says, Circle C Copyright, 2019, Strike 3
8 Holdings, LLC.

9 THE COURT: I had a question for you, counsel. As I
10 read your papers, I thought you were making two general
11 arguments. Maxmind is not accurate, the reliability of the
12 data plaintiff relies on, quote, is called into question,
13 close quote.

14 Are those the arguments you're making in support of
15 your motion?

16 MR. SCULL: Correct, Your Honor.

17 THE COURT: All right. What data are you alleging is
18 not reliable?

19 MR. SCULL: The underlying data from IPP,
20 Your Honor. The certification of the reliability of the data
21 from IPP came from Mr. Bunting. Mr. Bunting, is not a
22 software engineer, Mr. Bunting's credentials don't make him a
23 software engineer. I don't know that he's ever examined the
24 source code or verified the source code of that -- of the IPP
25 software, and in reviewing the Seattle, Washington case and

1 the expert reports in the Seattle, Washington case it calls
2 into the accuracy of the IPP software. Those were based on my
3 arguments.

4 THE COURT: And what is it about Maxmind that you
5 have difficulty with?

6 MR. SCULL: According to the Maxmind website, the
7 website itself says, don't rely on this geolocation
8 technology, okay? The website itself calls into question
9 reliance on its own technology. Call it a disclaimer, call it
10 what you want, but when you look at that, Judge, you've gotta
11 wonder why they're telling you -- I mean, they're telling you
12 right on the website, don't rely on this because it's not
13 reliable.

14 THE COURT: The argument they make is that in this
15 case it was accurate, right? Is that what you said?

16 MR. ATKIN: Your Honor, if I can add one thing, too.
17 The part that counsel is referring to on the website that
18 says, don't rely on it, it was a disclaimer to, as we
19 discussed before, don't try to find a street address with
20 this, we have to go get a subpoena.

21 But also, it talked about taking down two databases,
22 which I have notes here, GeoIP, and GeoIP2 Lite, which are not
23 the databases that Strike 3 uses. Strike 3 uses geolocation
24 precision services, too, I believe. I may be misstating it.

25 MS. KENNEDY: We use the one with the highest

1 accuracy.

2 MR. ATKIN: What Mr. Bunting hasn't been able to
3 testify to yet is that it's the same technology that law
4 enforcement uses as part of the Wyoming Toolkit to prosecute
5 internet crimes.

6 So the idea that Maxmind is not reliable is, yes,
7 boots on the ground, we've always found it to be reliable. We
8 have no evidence whatsoever that it wasn't, and I want to
9 tread very carefully here because I know we've talked to the
10 court about how this client's name has been revealed in the
11 public record and found exact town -- and an interesting fact
12 here is sometimes we'll get arguments in these cases there are
13 accuracy tolerances 20 miles, 50 miles, I don't remember what
14 the exact is. If you're on the Delaware River, it's very
15 possible you're showing up in Pennsylvania, you're not in
16 Pennsylvania, you're in Pennsville.

17 We always invite opposing counsel, if you can tell us
18 that, just show us the law in city and state, we will
19 dismiss -- we will rebring it maybe in the right spot if we
20 can. They never do, despite NJRPC 3.3A5, a duty of candor to
21 the tribunal to bring a negative fact. I'll have opposing
22 counsel stonewall me and say, I'm going to argue without any
23 kind of factual support that my client is not proven to be in
24 New Jersey and I'll say, okay, but does he live in New Jersey
25 and New York and he'll say, I'm not going to tell you.

1 And I've a case that's now been briefed before Judge
2 Bongiovanni where opposing counsel accidentally filed a part of
3 the retainer agreement, showed the exact city and state, and
4 now we're arguing clawback there and it's -- one of the
5 arguments is you have a duty if you know that they've been
6 found, to at least tell the Court so they're not misled into
7 believing it's not accurate.

8 So the fact that law enforcement uses this, the fact
9 that it's proven accurate, the fact that Mr. Bunting
10 will testify, you know, if he's able to, about the accuracy
11 that he's seen, and just in this case, that we've been able to
12 track it there, I think that just puts it to rest.

13 MR. BANDLOW: And Your Honor asked about how many
14 cases, and it's 3,000. The number of times we've found
15 Maxmind to be wrong is zero.

16 THE COURT: Do you want to, "you" being Strike 3,
17 want to present any evidence or testimony? I've just been
18 asking questions during this hearing so far.

19 MR. BANDLOW: I mean, I think we would -- I would
20 like, and we can do it -- I appreciate the sort of informal
21 style we've been doing it. I'd like to just have Mr. Bunting
22 just tell you briefly about two things, his experience with
23 basically doing what we've been talking about all day, but
24 doing it for purposes of law enforcement, and his testing of
25 the IPP technology that was used in this case.

1 So can you tell the Court --

2 THE COURT: Maybe now is a good time -- it's 3:15.

3 Let's take a break for 15 minutes, and we'll come back at 3:30
4 and start this.

5 MR. BANDLOW: That would be great, Your Honor.

6 MR. ATKIN: Thank you, Your Honor.

7 (RECESS TAKEN; 3:15 p.m.)

8 THE DEPUTY CLERK: All rise.

9 (OPEN COURT; 3:41 p.m.)

10 THE COURT: Good afternoon. Please be seated. I
11 just have a few more questions and then I'll turn it over to
12 you, okay?

13 Ms. Kennedy, who is 7 Rivers?

14 MS. KENNEDY: 7 Rivers is the company that we use to
15 again confirm the line to double verify the information that's
16 sent to the ISP, and John Pasquale works for 7 Rivers.

17 THE COURT: How long have you used 7 Rivers?

18 MS. KENNEDY: I'm want to say about two years.

19 THE COURT: Has it been since Strike 3 started filing
20 these cases?

21 MS. KENNEDY: I believe so, approximately around the
22 time when we first started filing these cases.

23 THE COURT: Is Mr. Pasquale a principal in 7 Rivers?

24 MS. KENNEDY: No, I believe it's owned by his son
25 Paul Pasquale.

1 THE COURT: Okay. And what is it, is it a big
2 company, small company, two-man operation?

3 MS. KENNEDY: From my understanding, it's a small
4 company, and they do a number of different types of forensic
5 computer work.

6 THE COURT: Does 7 River do business with any
7 company, other than Strike 3?

8 MS. KENNEDY: I believe they do.

9 THE COURT: Do you know what percentage of business
10 Strike 3 is of 7 River?

11 MS. KENNEDY: I don't.

12 THE COURT: Do you know, Mr. Pasquale?

13 MR. PASQUALE: No, I do not.

14 THE COURT: You do not?

15 MR. PASQUALE: Nope.

16 THE COURT: How long have you been working for the
17 company?

18 MR. PASQUALE: For about a year and a half.

19 THE COURT: And your son owns the company?

20 MR. PASQUALE: Yes, he does.

21 THE COURT: How many employees in the company?

22 MR. PASQUALE: He is the only employee. The rest are
23 consultants.

24 THE COURT: How many -- are you considered a
25 consultant?

1 MR. PASQUALE: Yes.

2 THE COURT: How many consultants are there?

3 MR. PASQUALE: I believe he has about five working
4 for him.

5 THE COURT: How many consultants work for Strike 3?

6 MR. PASQUALE: There are three.

7 THE COURT: What percentage of your work is done for
8 Strike 3?

9 MR. PASQUALE: When it comes to 7 Rivers, one hundred
10 percent.

11 THE COURT: Do you work for somebody else?

12 MR. PASQUALE: Yes.

13 THE COURT: What percentage of your total work is 7
14 Rivers?

15 MR. PASQUALE: I would say about ten percent.

16 THE COURT: Do you bill Strike 3, what, per hour, per
17 job, per declaration? How do you bill them?

18 MR. PASQUALE: I'm really not sure what the agreement
19 is between 7 Rivers and Strike 3. I don't do the billing for
20 the firm.

21 THE COURT: You've been working there a year and a
22 half and you don't know how 7 River bills Strike 3?

23 MR. PASQUALE: No.

24 THE COURT: Do you know, Ms. Kennedy?

25 MS. KENNEDY: Yes. It's per case.

1 THE COURT: Per case. Flat fee?

2 MS. KENNEDY: Yes.

3 THE COURT: Mr. Pasquale, are you the only person who
4 handles New Jersey cases?

5 MR. PASQUALE: I'm not exactly sure.

6 THE COURT: Do you work at home or you work in an
7 office, Mr. Pasquale?

8 MR. PASQUALE: When it comes to 7 Rivers, I work from
9 home.

10 THE COURT: Now, we've been provided a declaration
11 from you in this case. Who prepared this declaration?

12 MR. PASQUALE: That was done by Strike 3, I believe.

13 THE COURT: And is it the same form affidavit --
14 excuse me -- declaration used in each case?

15 MR. PASQUALE: Yes, it is.

16 THE COURT: You sign the affidavits? I'm sorry,
17 declarations.

18 MR. PASQUALE: Yes.

19 THE COURT: Handwritten?

20 MR. PASQUALE: Electronically.

21 THE COURT: So the signature on these declarations,
22 that's an electronic signature?

23 MR. PASQUALE: That's correct.

24 THE COURT: And then, what, you e-mail it to Strike
25 3?

1 MR. PASQUALE: I put it on a Jira software
2 application where they are then collected and then I believe
3 Strike 3 gathers them.

4 THE COURT: For the record, I'm referring to
5 plaintiff's Notice of Motion For Leave to Serve a Third Party
6 Subpoena, Document 4.

7 Your declaration, Mr. Pasquale, is Docket 4-4. Are
8 you saying that this declaration is prepared by Strike 3 and
9 sent to you?

10 MR. PASQUALE: That's correct.

11 THE COURT: Who at Strike 3 prepared this
12 declaration?

13 MR. PASQUALE: I don't know who prepared it from
14 Strike 3.

15 THE COURT: Do you have records of who prepared it?
16 Who sent you the e-mail?

17 MR. PASQUALE: It is -- those are stored along with
18 the PCAPs on a program called Jira, where I had then pulled
19 those cases, meaning the PCAPs and the declarations.

20 THE COURT: How does whoever prepares the declaration
21 know what to put in the declaration?

22 MR. PASQUALE: I can't answer that, because I don't
23 know who prepares the declaration, but I'm assuming that
24 they're looking at the PCAP and also the declaration.

25 THE COURT: Okay. All right. Let's get this

1 straight. Do you do any work on a particular case before the
2 John Doe Complaint is filed?

3 MR. PASQUALE: No.

4 THE COURT: You come in in connection with the motion
5 for expedited discovery, right?

6 MR. PASQUALE: Correct.

7 THE COURT: When and how do you get the background
8 information that you refer to in the declaration?

9 MR. PASQUALE: When and how?

10 THE COURT: Mm-hmm.

11 MR. PASQUALE: I get it from a program that's called
12 Jira, where all the cases are placed, and then I review them
13 one case at a time.

14 THE COURT: So anything that's in Jira, you look at?

15 MR. PASQUALE: Correct. That's assigned to me.

16 THE COURT: That's a great question.

17 Who puts that information into Jira and assigns that
18 to you?

19 MR. PASQUALE: That would be Paul, my son, the owner
20 of 7 River Systems.

21 THE COURT: And who does he get it from?

22 MR. PASQUALE: From Strike 3.

23 THE COURT: Do you know who at Strike 3?

24 MR. PASQUALE: No.

25 THE COURT: So it goes from Strike 3, to Paul, to

1 you.

2 MR. PASQUALE: Correct.

3 THE COURT: I'm sorry if I asked you this. Are you
4 the only person who does Strike 3 declarations?

5 MR. PASQUALE: No.

6 THE COURT: How does Paul decide who to assign a
7 particular case to?

8 MR. PASQUALE: I'm not sure exactly how he assigns
9 it, but I have to believe it's by region. So for the
10 northeast, I would probably be assigned the stuff in the
11 northeast, along with stuff, I believe, in the northwest.

12 THE COURT: So you go on to Jira and you see that
13 they've asked you to do certain work with regard to this IP
14 address, right?

15 MR. PASQUALE: Yes.

16 THE COURT: And is it the same work with regard to
17 each address?

18 MR. PASQUALE: I'm sorry, say that again.

19 THE COURT: I mean, I don't know, do they send you --
20 does Paul assign you 10 or 20 or a hundred IP addresses at one
21 time?

22 MR. PASQUALE: Yes.

23 THE COURT: And let's say it's 20, do you do the same
24 work on all 20?

25 MR. PASQUALE: I do the same type of investigation,

1 yes.

2 THE COURT: And how much time do you spend on each IP
3 address?

4 MR. PASQUALE: It all depends. It could be up to 10
5 minutes.

6 THE COURT: And it could be as short as what?

7 MR. PASQUALE: A minute.

8 THE COURT: And once you do your verification, what
9 then do you do?

10 MR. PASQUALE: I then put my signature to the
11 declaration and save it back into Jira.

12 THE COURT: Is the declaration in the Jira program,
13 when you receive the background source information?

14 MR. PASQUALE: Yes, it is.

15 THE COURT: So someone at Strike 3 says, we want Mr.
16 -- we want the company --

17 MR. PASQUALE: 7 Rivers.

18 THE COURT: -- not you, right, not you individually,
19 to sign this declaration. They send it to Paul with the
20 background source information. He assigns it to you and you
21 spend one to ten minutes verifying the information.

22 MR. PASQUALE: Correct.

23 THE COURT: And then you electronically sign the
24 declaration. Do you send it back to Paul or do you send it
25 directly to Strike 3?

1 MR. PASQUALE: I don't send it to either, I add it on
2 to the Jira program.

3 THE COURT: Okay. What do you do to confirm that IPP
4 recorded the transaction with this particular IP address at
5 the noted UTC time? What do you physically do?

6 MR. PASQUALE: So I take a look at the protocol which
7 is Bit Turn, and from there I notice the timestamp along with
8 the source and destination IP address, and within the PCAP
9 there's a description piece. I look for an item that's called
10 piece begin. So that means that the transmission is actually
11 happening. So at that particular time, with that timestamp,
12 that's when the download or the data transmission is happening
13 and that's what I confirm.

14 THE COURT: Does that require technical expertise, or
15 is it just a matter of checking that all the I's are dotted
16 and T's are crossed?

17 MR. PASQUALE: Well, it needs technical expertise,
18 and, yes, it's a matter of ensuring that the I's are dotted
19 and T's are crossed, if you're a technical person.

20 THE COURT: If you showed me what to look for and I
21 spent a day looking over your shoulder, would I be able to do
22 what you do? Not me -- okay, let's take an ordinary
23 reasonable person, not me.

24 MR. PASQUALE: Yes. The answer is yes, no matter who
25 it is.

1 THE COURT: So you're not really doing
2 roll-up-your-sleeves technical analysis, you're checking the
3 paperwork.

4 MR. PASQUALE: I'm doing a verification.

5 THE COURT: Why do you need to do that? Why do we
6 need a separate company to do that?

7 MS. KENNEDY: My rationale to have 7 Rivers do it is,
8 one -- and IPP is in Germany, unfortunately. We wish they
9 were in our backyard and we could run over to their office.
10 But I just want a second pair of human eyes that's not someone
11 in my company to say, you know, this IP address, this hit date
12 and time, which is going to be used by Comcast to locate the
13 infringer, which in my view, doing this litigation is one of
14 the riskiest areas. You know, if there's a number wrong on
15 the IP address, or if it's, you know, even 30 seconds or a
16 minute or five minutes or ten minutes off, it could create a
17 hypothetical risk of misidentification.

18 So for me, I just want one other set of eyes to look
19 at that information and say, yes, when you send that subpoena
20 to Comcast, I double checked, there is an actual PCAP that has
21 recorded the infringement taking place.

22 THE COURT: So what 7 Rivers does is just check the
23 paperwork.

24 MS. KENNEDY: Correct.

25 THE COURT: But does anybody roll up their sleeves to

1 check that what IPP is doing is accurate and correct?

2 MS. KENNEDY: Yes, that's what Mr. Bunting has done.

3 THE COURT: Did he do that in this case?

4 MS. KENNEDY: What -- well, I can only testify what
5 he did was he tested their overall system and monitoring
6 system to make sure that it works as it says they do and that
7 it --

8 THE COURT: So Mr. Bunting looked sort of on a macro
9 level --

10 MS. KENNEDY: Yes.

11 THE COURT: -- what IPP does.

12 MS. KENNEDY: Right.

13 THE COURT: But he did no work -- make the record
14 clear, Mr. Bunting did no work on this particular case.

15 MS. KENNEDY: No, not specifically on this particular
16 case, but -- no.

17 THE COURT: When did Mr. Bunting -- excuse me, sir,
18 could you put that silver bottle away. You can't drink soda
19 in a federal courtroom.

20 MR. PASQUALE: I apologize.

21 THE COURT: When did Mr. Bunting do his verification?

22 MS. KENNEDY: I believe he did it about -- a year
23 ago?

24 MR. BUNTING: January 23rd last year.

25 THE COURT: I'm sorry, January 23rd?

1 MR. BUNTING: 23rd of 2018.

2 MS. KENNEDY: And, Your Honor, just to add, I worked
3 with IPP in the past and, you know, I've seen their system be
4 tested through a trial procedure, you know, with, you know,
5 going through the entire gauntlet of discovery. I've seen
6 them deposed. Another expert that I've worked with has tested
7 their system. I've seen their system tested in, like, say
8 half a dozen evidentiary hearings throughout the country.

9 So I have a good faith reasonable belief that it
10 works, because it's never been proven to not work.

11 Mr. Bunting is the one who most recently has tested
12 it, but it's been tested time and time again, over and over
13 again.

14 MR. ATKIN: Judge, if I could add just two different
15 things on actually two different points there. The first, I
16 think your question, has someone gone to IPP in this case and
17 tested it. If you'll read Mr. Bunting's report, and I think
18 he'll testify soon about how he set up the test, he needed to
19 have access to all the parts of the computer network in order
20 to see where the file went to. Asking us if we've tested with
21 this Doe's computer is sort of half the question because we
22 can say, we're seeing it, but until we can go over to his
23 house, knock on his door and say, hey, do you actually have it
24 on your computer, we're not going to have that closed loop in
25 this specific case.

1 And the other thing, Judge, not that I'm asking Mr.
2 Pasquale to get sworn in right now, but you preempted one of
3 my questions that he was my responsibility to do the direct
4 for. And just, Mr. Pasquale, in terms of these
5 certifications -- first of all for the record, I believe the
6 lowest docket number here --

7 THE COURT: Declarations.

8 MR. ATKIN: -- declarations. I'm sorry, Judge. The
9 lowest docket number here was done by Phillip Pasquale who I
10 believe is your nephew.

11 MR. PASQUALE: Nephew.

12 MR. ATKIN: There is another Pasquale. I've seen his
13 name --

14 THE COURT: He worked for --

15 MR. ATKIN: 7 Rivers as well. And I've actually -- I
16 know that I've accidentally put the wrong cover page on things
17 at times. I think that happened in this case.

18 But the second question that I think is important is,
19 Mr. Pasquale, have you ever rejected a certification that's
20 been handed to you by Strike 3 on Jira along with the PCAP?

21 MR. PASQUALE: Yes, I have.

22 MR. ATKIN: And could you tell the Court about why
23 you would do that and what has happened?

24 MR. PASQUALE: I do it because, No. 1, it's my
25 reputation on the line that I'm confirming that the

1 information on the declaration is correct.

2 The other thing is, I'm also putting 7 River
3 Systems's reputation on the line. Not only that, this is a
4 federal -- I don't know, it's a court matter, and obviously
5 the information -- the information needs to be correct, so
6 that's why we confirm it.

7 MR. ATKIN: That's all I have, Your Honor.

8 THE COURT: Thank you. I want to turn the floor over
9 to Strike 3.

10 MR. BANDLOW: Thank you, Your Honor. We just wanted
11 to spend a little bit of time, and you've done an excellent
12 time of really canvassing most of the important issues, but I
13 think there's some additional input we can have from Mr.
14 Bunting. Is it okay if we keep this informal -- okay. I
15 appreciate that, Your Honor.

16 What I'd like to ask Mr. Bunting to do, and I don't
17 think I need to go over his qualifications, he submitted a --

18 THE COURT: You don't need to.

19 MR. BANDLOW: -- a pretty detailed CV on this issue.

20 THE COURT: Let's get to the crux.

21 MR. BANDLOW: Let's get to the heart of it, I agree.

22 And Mr. Bunting was a police officer for 35 years and
23 spent the last --

24 THE COURT: I've read it. Let's just get to the
25 crux.

1 MR. BANDLOW: Okay. So, tell the Court just in
2 general about how -- you've heard about this use of this
3 technology to find people who are doing things on the
4 internet. You essentially did that in a slightly different
5 context, for over a decade. So give the Court a little sense
6 of how you used some of the same technology and did sort of
7 some of the same things.

8 MR. BUNTING: In the spring of 2018 as a member of
9 the Delaware ICAC, which is Internet Crimes Against Children
10 Task Force, a group of us attended training from Flint Waters.
11 He is the head of the Wyoming ICAC, and he uses software that
12 he actually developed and wrote himself, it's called the
13 Wyoming Toolkit. And basically, it runs on top of
14 peer-to-peer network. At the time it was running on top of a
15 Gnutella network, which is slightly different from BitTorrent,
16 but they're really somewhat the same in that both require
17 direct connection to the computers or between the computers
18 they're sharing the files.

19 So we had basically used a client, was called PHEX,
20 P-H-E-X, it was a Gnutella client that had been modified to
21 work with the Toolkit and we were then able to go on the
22 internet and search for basically child pornography and those
23 who were hosting it.

24 THE COURT: I don't mean to cut you off, Mr. Bunting.
25 I read all this --

1 MR. BUNTING: Okay.

2 THE COURT: -- I understand it. Let's just get to
3 this case, counsel.

4 MR. BANDLOW: Okay. That's fine.

5 THE COURT: I understand -- I read all this, I
6 understand it.

7 MR. BANDLOW: Got it.

8 THE COURT: Let's get to the crux.

9 MR. BANDLOW: We have heard some mention of Maxmind.
10 Is that something that you used in connection with that and
11 found it to --

12 MR. BUNTING: Actually, Maxmind was built into the
13 program. Wyoming Toolkit contracted with Maxmind and
14 basically they used it as part of what we call the geofencing
15 so we could then determine which police jurisdiction to assign
16 to a specific IP address based on it's location.

17 MR. BANDLOW: And you never found it to be inaccurate
18 and said at least identifying a certain radius for where you
19 needed to be.

20 MR. BUNTING: A general region, yes.

21 MR. BANDLOW: Okay. And then importantly for this
22 case, if you can, just for the Court, explain the general
23 process you undertook to test the IPP
24 software.

25 MR. BUNTING: Basically, I took four files that I

1 created myself, movies, in my own backyard. I hashed them
2 both with an MD5 and a SHA hash that I could -- basically an
3 electronic fingerprint so that I could identify them later. I
4 embedded some metadata inside of them so that I again could
5 look inside the files and again identify them in addition to
6 the pictures themselves, of course, but data that I had placed
7 inside the metadata fields.

8 I then created torrent files from them, I sent those
9 four torrent files to Ben Perino at IPP. The following day,
10 then, I had four machines configured, four laptops. One was
11 configured with Windows 10, another was configured with a Mac
12 operating system, another was configured with a Windows 7 and
13 another was configured with Linux. And I used different
14 BitTorrent clients on each one, so again I had a diverse
15 hardware platform, a diverse operating system platform and a
16 diverse set of BitTorrent clients.

17 So I had four movies. I put -- used the one host
18 that I used to create them all, the torrents, I tested that
19 they were able to download the movies from my source where I
20 created it, got all four clients, were able to then download
21 it. I then turned off that host so that now it only existed
22 on four laptops, a movie, different one on each one.

23 I took two of them, the Linux one and the Windows 7,
24 and connected them to my network and informed Mr. Perino that
25 they were active and to seek to try to find them.

1 It took me awhile, a third laptop, and took it to
2 University Library and at that location, I had a direct -- the
3 IP address assigned there is dynamic but it is an internet
4 routable IP address assigned directly to the machine. So
5 basically, I had a direct IP address and not one that was
6 tucked behind a router that is what we call a private network
7 like at home, but rather a public one.

8 Within about a half hour of that connection, he then,
9 Perino, informed me he had already downloaded all three. So
10 then I went back home and attached the fourth one to the
11 internet, which was a Mac, and he was able to quickly identify
12 that one. He sent me a report and when I did this on each
13 machine, I had installed Wire Shark, which basically is an
14 open source tool used by the industry to capture network
15 packets. And data travels on the network in what we call
16 packets, and these packets have very similar to a piece of
17 mail you would send, they have address on them, and that
18 address very much like in the mail, where the recipient, we
19 call that the destination address and that's the IP address,
20 and where it's going and there's a return address and we call
21 that the destination.

22 So each packet is so labeled and goes through the
23 network and PCAP is a collection of these packets and so Wire
24 Shark captures this data.

25 So I was then able to compare the data that was

1 captured on my machine to that which was eventually sent to me
2 from Ben Perino. Everything matched up, the times were all
3 synchronized beforehand, so my times matched his times,
4 reports matched, the IP addresses matched, he was able to
5 downloaded all four files. Sent me those files and I rehashed
6 them. All the original hashes matched the hashes on the ones
7 that he collected, the metadata were all there, they were
8 identical in all regards. He was able to successfully capture
9 my IP addresses, the one at the University library and the one
10 at home. I knew what they were beforehand. They were
11 accurately captured, so any subpoena that would have been
12 issued based upon that information would have accurately
13 identified me as a subscriber, just a simple basic test to see
14 if it worked.

15 MR. BANDLOW: And just one follow up on something
16 earlier. So when you were doing child pornography
17 investigations and you would find an IP address that appeared
18 to be transacting in that material, you would use that
19 information to give to a district attorney, or what have you,
20 to obtain a search warrant?

21 MR. BUNTING: No. We give it to the prosecutor or
22 district attorney who would then get a subpoena, issue a
23 subpoena to the ISP --

24 MR. BANDLOW: Okay.

25 MR. BUNTING: -- which would then reveal the

1 subscriber and then we would further investigate, run a DMV
2 check to see what cars were at that residence, what persons
3 were there, tax records, whatever we could find. We would go
4 sit out and watch the address for a day or two, see who was
5 there, who was coming and going, and then eventually we would
6 execute a search warrant.

7 MR. BANDLOW: And the search warrant would be based
8 on the belief that someone in that household is transacting in
9 child pornography.

10 MR. BUNTING: Yes.

11 MR. BANDLOW: And no one ever challenged any of those
12 search warrants and said, all you had was an IP address and
13 went in?

14 MR. BUNTING: No. They challenged the search
15 warrants, but never on that.

16 MR. BANDLOW: All right. That's all I have, Your
17 Honor.

18 THE COURT: I have a few questions. What is a
19 MaverickEye, an MEU?

20 MR. BUNTING: That was in my report. That was one of
21 the names that was given to that system that they had there --

22 MR. BANDLOW: The IPP.

23 MR. BUNTING: GuardaLey.

24 THE COURT: IPP system.

25 MR. BUNTING: IPP system, yes.

1 THE COURT: Does that system capture the exact name
2 of the BitTorrent client and version numbers that were in use
3 by each test computer?

4 MR. BUNTING: Yes.

5 THE COURT: Does that system capture the source port
6 number in addition to the source IP address?

7 MR. BUNTING: It does.

8 THE COURT: What is the significance of the port
9 number?

10 MR. BUNTING: Port number -- easiest way to kind of
11 visualize this. Let's say you're looking at your house and
12 the IP address would identify your house and you have a lot of
13 different services on your computer that use the internet and
14 so there has to be a way of segregating, track it for each of
15 those applications, so it just doesn't all come into a jumble.
16 So it's done by isolating it through ports which are virtual
17 constructs, if you will, within what we call the network
18 system.

19 So, for instance, a browser would use port 80, or
20 your e-mail might -- or your FTP, which is a file transfer
21 protocol, would use port 21, but many of your torrent clients
22 use a variety of different ports, and so whatever port is
23 assigned or configured for that client is the port, which it
24 will use to transact its network business under that IP
25 address. It allows you, if you will, to multiplex, if you

1 will, have one IP address that's serving many different
2 services on your computer, and each one of those are bound to
3 a port.

4 THE COURT: If we take a situation where multiple
5 works were downloaded from the same IP address --

6 MR. BUNTING: Yes.

7 THE COURT: -- but there's different ports associated
8 with that IP address, what does that tell you?

9 MR. BUNTING: Well, it can mean a couple of things.
10 One, that you have a couple of different computers or devices,
11 because they can't use the same port at the same time. So if
12 they're both on there at the same time, you had two computers,
13 one would have to have a different port.

14 Also, if you had one device that had two different
15 BitTorrent clients running. And I've seen this, where one
16 fellow actually had three. So they again couldn't all use the
17 same one. So again, different clients would use different
18 ports. So there's a couple of different interpretations you
19 could have on there.

20 THE COURT: But might it be an indication that
21 multiple devices were used to download the 31 different works?

22 MR. BUNTING: If you had different ports, it could
23 mean that or it could mean, again, one device, different
24 clients.

25 THE COURT: Is it correct that IPP

1 system, it identifies the port used by the BitTorrent client
2 on the internet-facing device, if not the computer itself; is
3 that correct?

4 MR. BUNTING: That's correct, yes.

5 THE COURT: That's a correct statement.

6 And the IPP system also identifies the actual name of
7 the BitTorrent?

8 MR. BUNTING: BitTorrent client, yes.

9 THE COURT: And does the IPP
10 system also identify the version number of the BitTorrent
11 software?

12 MR. BUNTING: It does.

13 THE COURT: So suppose at the same IP address, the
14 IPP data reveals that the downloads were done by different
15 versions of BitTorrent software, would that be an indication
16 that different devices were used?

17 MR. BUNTING: Different devices, or it could also be
18 that they updated their version of the client over the course
19 of time.

20 THE COURT: Counsel, I don't have any other
21 questions, do you?

22 MR. SCULL: I do, Your Honor.

23 Mr. Bunting, are you -- how many computer degrees in
24 computer science do you have? Do you have a degree in
25 computer science?

1 MR. BUNTING: None. Computer science, no.

2 MR. SCULL: Are you a software engineer?

3 MR. BUNTING: I am not.

4 MR. SCULL: Have you ever written any code?

5 MR. BUNTING: Small scripts.

6 MR. SCULL: Have you ever inspected any code?

7 MR. BUNTING: Again, small scripts.

8 MR. SCULL: You -- did you at any point in time
9 examine or refer or review the technical manual for IPP?

10 MR. BUNTING: I did not.

11 MR. SCULL: The -- so are you qualified to validate
12 source code?

13 MR. BUNTING: No.

14 MR. SCULL: Now, the system that you tested was a
15 four-computer system, isn't that correct?

16 MR. BUNTING: A what? Sorry.

17 MR. SCULL: A four-computer system.

18 MR. BUNTING: I configured four separate computers,
19 yes.

20 MR. SCULL: Have you ever tested anything larger than
21 that?

22 MR. BUNTING: On the IPP system? No.

23 MR. SCULL: Do you know -- what's the difference
24 between a false positive and a false negative?

25 MR. BUNTING: Well, false positive, you're getting a

1 reading that's some kind of information -- again, it's my
2 definition.

3 MR. SCULL: What's the mean time of failure for the
4 IPP software; do you know that?

5 MR. BUNTING: Mean time of failure?

6 MR. SCULL: Yes.

7 MR. BUNTING: I don't know.

8 MR. SCULL: I have nothing further, Your Honor.

9 THE COURT: I don't have any questions. Any
10 follow-up?

11 MR. BANDLOW: No, Your Honor. Oh, actually you have
12 something.

13 MS. KENNEDY: I just want to ask, was it necessary to
14 examine IPP's software to determine -- or source code to
15 determine whether or not the system works?

16 MR. BUNTING: No, I simply devised a simple test to
17 see if it could identify me and do so accurately.

18 MR. SCULL: I'm sorry, I do have one more question,
19 Your Honor.

20 You didn't evaluate IPP's software or performance in
21 this case, did you?

22 MR. BUNTING: For performance?

23 MR. SCULL: In this case, correct.

24 MR. BUNTING: In this particular case here, no.

25 MR. SCULL: And you didn't review any of the packets

1 that were downloaded?

2 MR. BUNTING: No.

3 MR. SCULL: And you didn't review any documentation
4 from IPP whatsoever, is that correct?

5 MR. BUNTING: For?

6 MR. SCULL: For this case.

7 MR. BUNTING: No.

8 MR. SCULL: Nothing further, Judge.

9 THE COURT: Okay. Just give me a moment.

10 As far as this Court is concerned, I have no further
11 questions or issues to address with counsel. Counsel,
12 anything else you want to address?

13 MR. SCULL: No, Your Honor. No, I really don't.

14 THE COURT: Strike 3, anything else?

15 MS. KENNEDY: No, Your Honor.

16 MR. ATKIN: No, Your Honor.

17 THE COURT: The Court reserves decision on the motion
18 to quash, and the order to show cause. We will get a copy of
19 the transcript, you'll get the Court's decision promptly and I
20 appreciate the courtesy and professionalism of Strike 3 and
21 defense counsel. This was a very helpful and informative
22 hearings, and I appreciate all the time and effort you put
23 into it.

24 MR. BANDLOW: Thank you, Your Honor. There were
25 moments, Your Honor, there may have been additional

1 information you wanted. If you find you do, please let us
2 know.

3 THE COURT: Okay. Oh, good question. I am going to
4 ask you if you could provide from New Jersey similar
5 information that you provided to Judge Orenstein, is it, in
6 Brooklyn, and then there was one other thing early this
7 afternoon -- this morning -- it seems like a week ago, but it
8 was this morning. You said there was a spreadsheet of
9 information regarding defendant.

10 MR. BANDLOW: The additional information spreadsheet
11 of other things downloaded, we can easily provide that.

12 THE COURT: Yes.

13 MS. KENNEDY: Your Honor, may I just add, when
14 providing that spreadsheet, there's a lot of information that
15 could identify the defendant. There's also a lot of adult
16 content of it and courts in the past have asked us not to put
17 it on the public record.

18 THE COURT: Oh, hundred percent. Oh, you're
19 absolutely right. Do you -- is it appropriate to send a copy
20 to defendant?

21 MS. KENNEDY: Yes, absolutely.

22 THE COURT: Oh, absolutely don't put it on Pacer,
23 just mail it to the Court. Absolutely.

24 MR. SCULL: I'm sorry, what's the spreadsheet you're
25 going to provide?

1 MS. KENNEDY: It's basically all of the additional
2 information that IPP's recorded.

3 MR. BANDLOW: That IP address, what it downloaded.

4 MR. SCULL: Time, date?

5 MR. BANDLOW: Yeah, but more than just Strike 3
6 content; mainstream, books, music, et cetera.

7 THE COURT: Absolutely, that's confidential material,
8 shouldn't go on.

9 MS. KENNEDY: Thank you, Your Honor.

10 THE COURT: If I do refer to it, I guess I'll have to
11 put it under seal with an order, but we'll cross that bridge
12 when we get to it. Thank you for bringing that to my
13 attention, Ms. Kennedy.

14 Hopefully, you have a flight -- I should have asked
15 you what time your flight was.

16 MR. BANDLOW: I changed it from 5:20. I got lucky to
17 do that. I'm out of here at 8:45, so I think I'll make it.

18 THE COURT: Well, you can enjoy happy hour with our
19 new --

20 MR. BANDLOW: I've gotten several recommendations,
21 Your Honor, from the locals.

22 THE COURT: -- our new beer garden up the street.

23 MR. BANDLOW: They should give you a cut, Your
24 Honor --

25 THE COURT: It's better than saying we have a Subway

1 and a 7-Eleven, which was all we had to say for years, right?

2 And Guido's Pizza. Thank you very much.

3 RESPONSE: Thank you, Judge.

4 THE DEPUTY CLERK: All rise.

5 (4:19 p.m.)

6 -

7

8 I certify that the foregoing is a correct transcript
9 from the record of proceedings in the above-entitled matter.

10

11 /S/ Karen Friedlander, CRR, RMR
Court Reporter/Transcriber

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13 6-7-19
Date

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